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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91209747
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In the Matter of Application Serial No. 85644802
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**MOTION FOR LEAVE TO TAKE VIDEO TELECONFERENCE DISCOVERY
DEPOSITIONS AND/OR TELEPHONIC DISCOVERY DEPOSITIONS**

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Applicant/Petitioner, Bluewater Key RV Ownership Park Owners Association, Inc. (herein referred to as “Applicant/Petitioner”), through its undersigned counsel, moves for leave to conduct discovery depositions and testimony depositions by remote means pursuant to Rule 30(b)(4) of the Federal Rules of Civil Procedure, Section 404.06 of the TBMP, Section 703.01(b) of the TBMP, and Section 703.01(h) of the TBMP. *See* FED. R. CIV. P. 30(b)(4); TBMP §§ 404.06, 703.01(b), 703.01(h). Applicant/Petitioner requests permission from the Trademark Trial and Appeal Board to conduct video teleconference testimony depositions of Ronald Lacroix during the testimony period. Applicant/Petitioner requests permission from the Trademark Trial and Appeal Board to conduct discovery depositions and testimony depositions of James Mazurek by video teleconference. In addition, Applicant/Petitioner seeks approval to conduct a telephonic deposition of Richard Nageotte. Applicant/Petitioner sets forth herein sufficient grounds for the Trademark Trial and Appeal Board to liberally grant the motion for leave to conduct the depositions of Ronald Lacroix, James Mazurek, and Richard Nageotte by remote means. These grounds include illness, inability to travel, distance, and travel conflicts.

I. INTRODUCTION

On March 13, 2013, attorneys for Opposer/Respondent Rita Clark d/b/a Bluewater Rentals (“Opposer/Respondent”) filed a Notice of Opposition against Applicant/Petitioner. *See* Minor Decl. ¶ 2. On the same day, the Trademark Trial and Appeal Board issued an initial scheduling order. *See* Minor Decl. ¶ 3. According to the initial scheduling order, the deadline for Applicant/Petitioner to answer the Notice of Opposition was April 22, 2013. *See* Minor Decl. ¶ 4.

On April 18, 2013, attorneys for Applicant/Petitioner filed an Answer to Notice of Opposition and Counterclaim for Petition to Cancel. *See* Minor Decl. ¶ 5. On April 24, 2013, the Trademark Trial and Appeal Board issued a second scheduling order, which encompassed scheduling dates for the opposition claims in the Notice of Opposition and scheduling dates for a new cancellation counterclaim in the Answer to Notice of Opposition and Counterclaim for Petition to Cancel. *See* Minor Decl. ¶ 6. Under the second scheduling order of April 24, 2013, the answer to the cancellation counterclaim was due on May 24, 2013. *See* Minor Decl. ¶ 7. On May 23, 2013, attorneys for Opposer/Respondent filed Opposer’s Answer and Affirmative Defenses to Applicant’s Counterclaim for Petition to Cancel. *See* Minor Decl. ¶ 8.

The attorneys for the parties held a discovery conference and exchanged initial disclosures. *See* Minor Decl. ¶ 9. On August 8, 2013, attorneys for Applicant/Petitioner served admission requests. *See* Minor Decl. ¶ 10. On August 12, 2013, attorneys for Applicant/Petitioner served interrogatories and production requests. *See* Minor Decl. ¶ 11.

On October 6, 2013, attorneys for Opposer/Respondent filed a motion to extend the time to respond to discovery, served by attorneys for Applicant/Petitioner. *See* Minor Decl. ¶ 12. In the motion, attorneys for Opposer/Respondent requested an extension until September 27, 2013.

See Minor Decl. ¶ 13. In a decision of October 10, 2013, the Trademark Trial and Appeal Board granted the motion for extension of time, filed by attorneys for Opposer/Respondent. *See* Minor Decl. ¶ 14. In the decision of October 10, 2013, the Trademark Trial and Appeal Board indicated that all trial dates would remain the same. *See* Minor Decl. ¶ 15. After attorneys for Applicant/Petitioner made numerous requests for outstanding discovery, attorneys for Applicant/Petitioner received a discovery CD from attorneys for Opposer/Respondent on or about November 19, 2013. *See* Minor Decl. ¶ 16.

A. Factual Background and Procedural History for Motion for Leave

On November 21, 2013, attorneys for Applicant/Petitioner mailed overnight notices of discovery depositions for six fact witnesses. *See* Minor Decl. ¶ 17, Ex. A. On November 22, 2013, attorneys for Applicant/Petitioner emailed copies of the six notices of discovery depositions to attorneys for Opposer/Respondent. *See* Minor Decl. ¶ 18, Ex. A. On November 22, 2013, attorneys for Applicant/Petitioner mailed overnight copies of two more notices of discovery depositions for fact witnesses. *See* Minor Decl. ¶ 19, Ex. D. The notices from attorneys for Applicant/Petitioner indicated that the discovery depositions may be changed to a mutually agreeable time and location. *See* Minor Decl. ¶ 20, Exs. A-D.

On November 25, 2013, attorneys for Applicant/Petitioner inquired as to whether attorneys for Opposer/Respondent would consent to video teleconference depositions, which would be prudent and cost effective for all parties. *See* Minor Decl. ¶ 21, Ex. E. Attorneys for Applicant/Petitioner sought to depose some witnesses, who were out of the State of Florida and/or out of the United States. *See* Minor Decl. ¶ 22. The email of November 25, 2013 sent by attorneys for Applicant/Petitioner referred to proposed dates of December 11, 2013, December 12, 2013, and December 13, 2013 for discovery depositions. *See* Minor Decl. ¶ 23, Ex. E.

On November 25, 2013, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent had conflicts with the dates in the email of November 25, 2013. *See* Minor Decl. ¶ 24, Ex. F. Attorneys for Opposer/Respondent did not specify which dates were in conflict. *See* Minor Decl. ¶ 25, Ex. F.

On November 26, 2013, attorneys for Applicant/Petitioner emailed attorneys for Opposer/Respondent, indicating that attorneys for Applicant/Petitioner were attempting to find a mutually agreed upon schedule for all parties concerned. *See* Minor Decl. ¶ 26, Ex. G. In the email of November 26, 2013, attorneys for Applicant/Petitioner requested the availability of attorneys for Opposer/Respondent for discovery depositions during the dates of December 3, 2013 to December 17, 2013. *See* Minor Decl. ¶ 27, Ex. G.

On November 27, 2013, attorneys for Applicant/Petitioner sent a follow up email to attorneys for Opposer/Respondent. *See* Minor Decl. ¶ 28, Ex. H. In the email of November 27, 2013, attorneys for Applicant/Petitioner indicated that attorneys for Applicant/Petitioner had not received any available dates to re-notice discovery depositions for the witnesses. *See* Minor Decl. ¶ 29, Ex. H. Attorneys for Opposer/Respondent were unresponsive. *See* Minor Decl. ¶ 30, Ex. I.

On December 2, 2013, attorneys for Applicant/Petitioner sent a follow up email to attorneys for Opposer/Respondent. *See* Minor Decl. ¶ 31, Ex. I. In the email of December 2, 2013, attorneys for Applicant/Petitioner again requested available dates from attorneys for Opposer/Respondent regarding discovery depositions. *See* Minor Decl. ¶ 32, Ex. I. On December 2, 2013, attorneys for Applicant/Petitioner inquired about conducting some discovery depositions by video teleconference and conducting other discovery depositions only by telephonic means. *See* Minor Decl. ¶ 33, Ex. I.

On December 2, 2013, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent would like to hold a teleconference between 3:00pm and 5:30pm on December 2, 2013. *See* Minor Decl. ¶ 34, Ex. J. On December 2, 2013, attorneys for Applicant/Petitioner indicated that a teleconference could be held before 4:30pm on December 2, 2013 or attorneys for Opposer/Respondent could merely email the availability information to attorneys for Applicant/Petitioner. *See* Minor Decl. ¶ 35, Ex. K. At 5:00pm on December 2, 2013, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent were unable to hold the teleconference. *See* Minor Decl. ¶ 36, Ex. L. No availability information regarding discovery depositions was provided by attorneys for Opposer/Respondent on December 2, 2013. *See* Minor Decl. ¶ 37, Ex. L. Further, attorneys for Opposer/Respondent provided no information as to whether attorneys for Opposer/Respondent would consent to discovery depositions by video teleconference means or telephonic means. *See* Minor Decl. ¶ 38, Ex. L.

On December 3, 2013, attorneys for Opposer/Respondent sent an email, inquiring as to when attorneys for Applicant/Petitioner would be available for a teleconference on December 3, 2013 to discuss the scheduling of discovery depositions. *See* Minor Decl. ¶ 39, Ex. M. On December 3, 2013, attorneys for Applicant/Petitioner responded to the email of December 3, 2013 from attorneys for Opposer/Respondent. *See* Minor Decl. ¶ 40, Ex. N. Attorneys for Applicant/Petitioner responded that the attorneys for the parties could hold a teleconference before 3:00 pm on December 3, 2013. *See* Minor Decl. ¶ 41, Ex. N. In the email of December 3, 2013, attorneys for Applicant/Petitioner also indicated that otherwise, the dates and times could be emailed by attorneys for Opposer/Respondent to attorneys for Applicant/Petitioner. *See* Minor Decl. ¶ 42, Ex. N.

On December 3, 2013, attorneys for Opposer/Respondent held a teleconference with attorneys for Applicant/Petitioner. *See* Minor Decl. ¶ 43, Exs. O, P. In the teleconference of December 3, 2013, attorneys for Opposer/Respondent requested a ninety day extension of the discovery period. *See* Minor Decl. ¶ 44, Ex. N. On December 3, 2013, for the first time, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent wanted to take discovery depositions. *See* Minor Decl. ¶ 45, Ex. Q. Attorneys for Opposer/Respondent indicated that conducting so many discovery depositions close to the end of discovery would be impractical. *See* Minor Decl. ¶ 46, Ex. Q. Prior to December 3, 2013, attorneys for Opposer/Respondent had not noticed any discovery depositions. *See* Minor Decl. ¶ 47, Ex. Q. Further, prior to December 3, 2013, attorneys for Opposer/Respondent had not propounded any interrogatories, production requests, or admission requests upon Applicant/Petitioner. *See* Minor Decl. ¶ 48. Attorneys for Opposer/Respondent were well aware of the previous deadline of December 20, 2013 for the close of discovery because attorneys for Applicant/Petitioner often referenced the previous discovery deadline of December 20, 2013 in correspondences to attorneys for Opposer/Respondent regarding outstanding discovery. *See* Minor Decl. ¶ 49.

On December 3, 2013, attorneys for Applicant/Petitioner sent another email to counsel for Opposer/Respondent again requesting dates of availability for discovery depositions prior to the previous deadline for close of discovery. *See* Minor Decl. ¶ 50, Ex. Q. On December 3, 2013, attorneys for Applicant/Petitioner indicated that the Trademark Trial and Appeal Board did not currently have before it a motion for extension of the discovery period and the Trademark Trial and Appeal Board had not granted a motion to extend the discovery period. *See* Minor Decl. ¶ 51, Ex. Q. Attorneys for Applicant/Petitioner indicated that attorneys for Applicant/Petitioner wanted to be cautious and re-notice discovery depositions in light of the fact that no motion for an

extension of the discovery period was currently before the Trademark Trial and Appeal Board for approval and there was no current order to extend the discovery period. *See* Minor Decl. ¶ 52, Ex. Q.

From November 22, 2013 to December 20, 2013, attorneys for Opposer/Respondent did not provide a single date, which opposing counsel for Opposer/Respondent would be available for discovery depositions. *See* Minor Decl. ¶ 53, Ex. A-Q. On December 9, 2013, attorneys for Applicant/Petitioner agreed to extend the discovery period ninety days. *See* Minor Decl. ¶ 54, Exs. R, S. A motion for an extension of time was filed with the Trademark Trial and Appeal Board on December 11, 2013. *See* Minor Decl. ¶ 55. The motion requested that the Trademark Trial and Appeal Board extend the discovery period ninety days and re-set the remaining dates in the second Scheduling Order. *See* Minor Decl. ¶ 56. The motion for a ninety day extension has been granted by the Trademark Trial and Appeal Board. *See* Minor Decl. ¶ 57.

Attorneys for Opposer/Respondent have been unresponsive to any requests to conduct depositions by video teleconference or telephone. *See* Minor Decl. ¶ 58, Exs. E-Q. To date, the parties have not entered into any stipulations regarding conducting discovery depositions by video teleconference or telephonic means. *See* Minor Decl. ¶ 59.

B. Standard

Section 404.06 of the TBMP and Rule 30(b)(4)¹ of the Federal Rules of Civil Procedure allow depositions to be conducted by telephone, video teleconference, or other remote means. *See* TBMP § 404.06; FED. R. CIV. P. 30(b)(4). Although Rule 30(b)(4) of the Federal Rules of Civil Procedure permits depositions by remote means as an alternative to in-person depositions, Rule 30(b)(4) of the Federal Rules of Civil Procedure does not provide a standard by which to evaluate

¹ Rule 30(b)(4) of the Federal Rules of Civil Procedure was formerly Rule 30(b)(7) of the Federal Rules of Civil Procedure.

such motions. *See Gerasimenko v. Cape Wind Trading Co.*, 272 F.R.D. 385, 387 (S.D.N.Y. 2011); *Zito v. Leasecomm Corp.*, 233 F.R.D. 395, 397-98 (S.D.N.Y. 2006); FED. R. CIV. P. 30(b)(4). “In applying and interpreting” the rules of the Trademark Trial and Appeal Board, the Trademark Trial and Appeal Board “must look to federal court practice, and currently federal practice favors the use of technological benefits in order to promote flexibility, simplification of procedure and reduction of costs to parties.” *Hewlett-Packard Co. v. Healthcare Personnel Inc.*, 21 U.S.P.Q.2d 1552, 1552-1553 (TTAB 1992) (citing *Julia M. Bywaters v. Lloyd K. Bywaters*, 123 F.R.D. 175, 176 (E.D.P.A. 1988). “[T]he courts have pointed out” that “when Fed. R. Civ. P. 30(b)(7) was amended in 1980 to permit the taking of telephone depositions, the purpose was to encourage courts to be more amenable to employing non-traditional methods for conducting depositions.” *Hewlett-Packard Co. v. Healthcare Personnel Inc.*, 21 U.S.P.Q.2d 1552, 1553 (TTAB 1992). Depositions by telephonic means reduce litigation costs. *See Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444, 446-447 (W.D. Mich. 1993) (the court indicating that there was “no reason to add the cost of two trans-Atlantic flights and hotel accommodations to the tab when the same task” could “be accomplished with two simple phone calls”). The courts have noted that “[p]arties routinely conduct depositions via videoconference, and courts encourage the same. . .” *Gee v. Suntrust Mortgage*, No. 10-cv-01509 RS (NC), 2011 WL 5597124, at *3 (N.D.Cal. Nov. 15, 2011). Videoconference depositions minimize travel costs. *See id.* In addition, videoconference depositions permit evaluation of creditability. *See id.* Courts have suggested conducting depositions by videoconference means in situations where witnesses would endure hardship if required to travel to distant locations. *See Zito v. Leasecomm Corp.*, 233 F.R.D. 395, 398 (S.D.N.Y. 2006).

There is no requirement to show extraordinary need to take depositions by remote means. *See Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444, 446 (W.D. Mich. 1993) (allowing telephonic depositions of witnesses, who were citizens of Germany and Sweden, without the showing of extraordinary need). “Nothing in the language of Rule 30” of the Federal Rules of Civil Procedure “requires a showing of necessity, financial inability or other hardship to obtain an order to proceed via telephone, and leave to take telephonic depositions should be liberally granted in appropriate cases.” *Hewlett-Packard Co. v. Healthcare Personnel Inc.*, 21 U.S.P.Q.2d 1552, 1553 (TTAB 1992). The burden is on the opposing party to demonstrate prejudice if depositions by remote means are conducted. *See Jahr v. UI Int’l Corp.*, 109 F.R.D. 429, 431 (M.D.N.C. 1986); *Cressler v. Neunenschwander*, 170 F.R.D. 20, 21 (D. Kan. 1996). An opposing party has the option of flying to the site of the deposition to be present with the witness or participating by telephone or other remote means. *See id.*

II. ARGUMENT

A. Opposer/Respondent Has a Duty to Cooperate with the Scheduling of Discovery Depositions

Rule 30(b)(4) of the Federal Rules of Civil Procedure provides as follows:

By Remote Means. The parties may stipulate—or the court may on motion—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

FED. R. CIV. P. 30(b)(4).

Section 404.06 of the TBMP provides that discovery depositions may be conducted by remote means if the parties stipulate to discovery depositions by remote means. *See* TBMP § 404.06. Otherwise, the Section 404.06 of the TBMP provides that discovery depositions may be conducted with the approval of the Trademark Trial and Appeal Board. *See* TBMP § 404.06.

Section 404.01 of the TBMP provides that “[a]s a matter of convenience and courtesy and to avoid scheduling conflicts, the parties should attempt to schedule depositions by agreement rather than have the deposition party unilaterally set a deposition date.” TBMP §404.01. “However,” Section 404.01 of the TBMP indicates that “it is not unusual for the deposing party to notice a deposition and subsequently discuss alternative dates with the party to be deposed.” TBMP § 404.01. The parties have a duty to cooperate in resolving conflicts in scheduling and taking of depositions. *See* TBMP §§ 404.01, 408.01; *Sunrider Corp. v. Raats*, 83 U.S.P.Q.2d 1648, 1654 (TTAB 2007); *Luehrmann v. Kwik Kopy Corp.*, 2 U.S.P.Q.2d 1303, 1304 (TTAB 1987).

To resolve a conflict in scheduling a deposition where travel is involved, parties may stipulate or the Trademark Trial and Appeal Board may order upon motion that the deposition be taken by telephone or other means. *See* FED. R.CIV. P. 30(b)(4); *Sunrider Corp. v. Raats*, 83 U.S.P.Q.2d 1648, 1654 (TTAB 2007). In the absence of cooperation, a motion for leave to take telephonic depositions and/or video teleconference is required under the Trademark Trial and Appeal Boards’ procedure. *See* TBMP § 408.01.

Opposer/Respondent has not cooperated in scheduling discovery depositions in this proceeding. Via express mail, attorneys for Applicant/Petitioner sent notices of discovery depositions on November 21, 2013 and November 22, 2013. *See* Minor Decl. ¶¶ 17-19, Exs. A-D. On November 22, 2013, attorneys for Applicant sent notices of discovery depositions via email. *See* Minor Decl. ¶ 18, Exs. A-D. On November 26, 2013, November 27, 2013, December 2, 2013, and December 3, 2013, attorneys for Applicant/Petitioner sent emails requesting the availability of attorneys for Opposer/Respondent. *See* Minor Decl. ¶¶ 26-36, Exs. G-I, M. On November 25, 2013, attorneys for Applicant/Petitioner inquired about consent to conduct video

teleconference discovery depositions. *See* Minor Decl. ¶ 21 Ex. E. On December 2, 2013, attorneys for Applicant/Petitioner inquired about video teleconference discovery depositions and telephonic depositions. *See* Minor Decl. ¶ 33, Ex. I. As mentioned above, attorneys for Opposer/Respondent has been unresponsive to any requests to conduct depositions by video teleconference or telephone. *See* Minor Decl. ¶ 58, Ex. E-Q. As such, attorneys for Opposer/Respondent has not stipulated to any video teleconference discovery depositions or telephonic discovery depositions. *See* Minor Decl. ¶ 59. Under the circumstances, attorneys for Applicant/Petitioner requests leave to conduct depositions by remote means.

B. Applicant/Petitioner Has Good Faith Legitimate Reasons for Requesting Video Teleconference and Telephonic Depositions

1. Since Ronald Lacroix Lives Outside the United States and Ronald Lacroix Is Willing to Be Deposed by Video Teleconference Deposition, the Trademark Trial and Appeal Board Should Grant Applicant/Petitioner's Request for Video Teleconference Testimony Deposition of Ronald Lacroix

Under Rule 30(b)(4) of the Fed. R. Civ. P., Section 404.06 of the TBMP, and Section 703.01(h) of the TBMP, a deposition by remotes means “takes place where” a “deponent answers the questions.” FED. R. CIV. P. 30(b)(4); TBMP §§ 404.06, 703.01(h). “A deposition may not be noticed for a place in a foreign country, unless the deposition is to be taken on written questions as provided by 37 C.F.R. § 2.124, or unless the Board, on motion for good cause, orders, or the parties stipulate, that the deposition be taken by oral examination.” TBMP § 703.01(d); *see also* TBMP § 703.01(b).

Attorneys for Applicant/Petitioner request leave to conduct a testimony deposition of Ronald Lacroix by video teleconference rather than in-person testimony deposition. Ronald Lacroix is one of the earliest members of the Bluewater Key RV Ownership Park Owners Association, Inc. *See* Lacroix Decl. ¶ 2. Ronald Lacroix purchased the first lot in Bluewater Key RV Ownership Park. *See* Lacroix Decl. ¶ 3. Ron Lacroix’s testimony is needed as the first lot purchaser in Bluewater Key RV Ownership Park and as an early member of the Bluewater Key RV Ownership Park Owners Association, Inc. Ronald Lacroix has invaluable knowledge regarding the early years of Bluewater Key RV Ownership Park Owners Association, Inc. *See* Lacroix Decl. ¶ 5. Ronald Lacroix’s testimony is also needed in Ron Lacroix’s capacity as a current Vice President of Bluewater Key RV Ownership Park Owners Association, Inc.

Attorneys for Applicant/Petitioner have good cause for requesting a testimony deposition of Ronald Lacroix by video teleconference during the upcoming testimony period. Ronald Lacroix is the current Vice President of Bluewater Key RV Ownership Park Owners Association, Inc. and Ronald Lacroix is one of the earliest members of Bluewater Key RV Ownership Park Owners Association, Inc. *See* Lacroix Decl. ¶¶ 2, 4. Ronald Lacroix is a Canadian citizen. *See* Lacroix Decl. ¶ 6. Ronald Lacroix will be visiting Bluewater Key RV Ownership Park from January 9, 2014 to April 25, 2014. *See* Lacroix Decl. ¶ 7. Since discovery closes on March 20, 2014, Ronald Lacroix will be available for an in-person discovery deposition during the discovery period. *See* Lacroix Decl. ¶ 8. After April 25, 2014, Ronald Lacroix will return to Ronald Lacroix's permanent residence in Quebec, Canada. *See* Lacroix Decl. ¶ 9. Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. is located in Key West, Florida. *See* Lacroix Decl. ¶ 10. Ronald Lacroix lives more than two-thousand miles from Key West, Florida. *See* Lacroix Decl. ¶ 10. Opposer/Respondent is located in Cudjoe Gardens, Florida. The office of attorneys for Opposer/Respondent is located in Fort Lauderdale, Florida. Ronald Lacroix is willing to submit to a testimony deposition by video teleconference. *See* Lacroix Decl. ¶ 11. Ronald Lacroix would prefer to have Ronald Lacroix's testimony deposition conducted by video teleconference means in Quebec, Canada rather than flying to Key West, Florida from Quebec, Canada for an in-person testimony deposition. *See* Lacroix Decl. ¶ 12. Conducting Ronald Lacroix's testimony deposition by video teleconference will reduce travel costs in the proceeding. *See* Lacroix Decl. ¶ 13.

Attorneys for Opposer/Respondent will not be prejudiced since attorneys for Opposer/Respondent may observe the demeanor of Ronald Lacroix in a video teleconference testimony deposition during the upcoming testimony period. In addition, Ronald Lacroix will be

available during the discovery period for an in-person discovery deposition in Key West, Florida. Ronald Lacroix will testify regarding a very small number of documents. Attorneys for Opposer/Respondent have the option of participating in a testimony deposition by video teleconference in Fort Lauderdale, Florida or flying to Quebec, Canada to be present with the witness, Ronald Lacroix in Quebec, Canada. In light of the current circumstances, Applicant/Petitioner requests that the Trademark Trial and Appeal Board grant the motion to conduct Ronald Lacroix's testimony deposition by video teleconference during the upcoming testimony period.

2. Since James Mazurek Lives Outside of Florida and James Mazurek Is Gravely Ill, the Trademark Trial and Appeal Board Should Grant Applicant/Petitioner's Request for a Video Teleconference Discovery Deposition and a Video Teleconference Testimony Deposition of James Mazurek

A deposition of a corporation generally takes place where the corporation has its principal place of business. *See U.S. ex rel. Barko v. Halliburton Co.*, 270 F.R.D. 26, 29 (D.D.C. 2010); *Nat'l Cmty. Reinvestment Coal. v. Novastar Fin., Inc.*, 604 F. Supp. 2d 26, 31 (D.D.C. 2009); *Moore v. Pyrotech Corp.*, 137 F.R.D. 356, 357 (D. Kan. 1991). Under Rule 30(b)(6) of the Federal Rules of Civil Procedure, corporations may designate an officer, director, managing agent, or a person, who consents to testify on behalf of the agency. *See* FED. R. CIV. P. 30(b)(6). Section 404.03(a)(1) of the TBMP provides that "[i]f a proposed deponent residing in the United States is a party, or, at the time set for the taking of the deposition, is an officer, director, or managing agent, or a person designated under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) to testify on behalf of a party, the deposition may be taken on notice alone." TBMP § 404.03(a)(1); FED. R. CIV. P. 30(b)(6), 31(a)(4).

In good faith, attorneys for Applicant/Petitioner request leave to conduct a discovery deposition of James Mazurek by video teleconference during the discovery period and leave to conduct a testimony deposition of James Mazurek by video teleconference during the upcoming testimony period. James Mazurek was a former president of Bluewater Key RV Ownership Park Owners Association, Inc. *See* Mazurek Decl. ¶ 2. James Mazurek was also a former member of the Board of Directors for Bluewater Key RV Ownership Park Owners Association, Inc. *See* Mazurek Decl. ¶ 3. As a former president and former member of the Board of Directors, James Mazurek has invaluable information regarding trademark priority and analogous use. *See* Mazurek Decl. ¶ 4. James Mazurek also has knowledge of Bluewater Key RV Ownership Park Owners Association, Inc.'s history with Rita Clark d/b/a Bluewater Rentals. *See* Mazurek Decl. ¶ 5.

Attorneys for Applicant/Petitioner have good cause for the request to conduct James Mazurek's depositions by video teleconference means. Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. is located in Key West, Florida. *See* Mazurek Decl. ¶ 6. Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. is a corporation with a principal place of business in Key West, Florida. *See* Mazurek Decl. ¶ 7. James Mazurek lives in Harrison Township, Michigan. *See* Mazurek Decl. ¶ 8. James Mazurek lives over one thousand miles from Key West, Florida. *See* Mazurek Decl. ¶ 9. James Mazurek is in failing health. *See* Mazurek Decl. ¶ 10. James Mazurek's health makes it difficult for James Mazurek to travel over one thousand miles to Key West, Florida and participate in in-person discovery depositions or in-person testimony depositions in Key West, Florida. *See* Mazurek Decl. ¶ 10. The offices of attorneys for Applicant/Petitioner are located in Latham, New York. Allowing James Mazurek to participate in video teleconference discovery depositions and video

teleconference testimony depositions will reduce litigation travel costs. *See* Mazurek Decl. ¶ 12. Further, ordering video teleconference depositions will relieve James Mazurek from having to travel over one thousand miles when James Maurek has a health condition. *See* Mazurek Decl. ¶ 11. Therefore, Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. requests that the Trademark Trial and Appeal Board grant the motion for leave to conduct a discovery deposition of James Mazurek by via video teleconference during the discovery period and a testimony deposition of James Mazurek by via video teleconference during the testimony period.

3. Since Dick Nageotte Will Be Traveling Outside the Country for Four Months, the Trademark Trial and Appeal Board Should Grant Applicant/Petitioner's Request for a Telephonic Discovery Deposition of Dick Nageotte

Attorneys for Applicant/Petitioner request leave to conduct a discovery deposition of Richard Nageotte by telephonic deposition. The new discovery deadline is March 20, 2014. As mentioned above, Applicant/Petitioner has a principal place of business in Key West, Florida. Richard Nageotte is an attorney by profession. *See* Nageotte Decl. ¶ 8. Richard Nageotte is a stockholder of Nageotte, Nageotte, and Nageotte, P.C. in Stafford, Virginia. *See* Nageotte Decl. ¶ 8. Richard Nageotte lives in Stafford, Virginia; however, Richard Nageotte will be leaving the country in January for four months. *See* Nageotte Decl. ¶ 9. Richard Nageotte will not return to the United States until May 20, 2014. *See* Nageotte Decl. ¶ 10. Richard Nageotte will be on a ship and it will be impossible to conduct a video teleconference discovery deposition during the discovery period. *See* Nageotte Decl. ¶ 11.

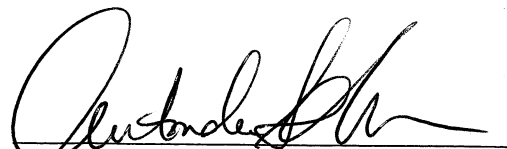
Attorneys for Applicant/Petitioner have good cause for seeking to depose Richard Nageotte by telephonic means. Initially, Richard Nageotte purchased lot 53 in Bluewater Key RV Ownership Park. *See* Nageotte Decl. ¶ 2. Later, Richard Nageotte purchased lot 52 in Bluewater

Key RV Ownership Park. *See* Nageotte Decl. ¶ 2. As an owner of lots in Bluewater Key RV Ownership Park, Richard Nageotte became a member of the Bluewater Key RV Ownership Park Owners Association, Inc. *See* Nageotte Decl. ¶ 3. Richard Nageotte served as a former member of the Board of Directors for Bluewater Key RV Ownership Park Owners Association, Inc. *See* Nageotte Decl. ¶ 4. Currently, Richard Nageotte owns lots 52 and 53 in Bluewater Key RV Ownership Park. *See* Nageotte Decl. ¶ 5. Today, Richard Nageotte is still a member of the Bluewater Key RV Ownership Park Owners Association, Inc. *See* Nageotte Decl. ¶ 6. Richard Nageotte was formerly the Vice President of Bluewater Key RV Ownership Park Owners Association, Inc. *See* Nageotte Decl. ¶ 7. Richard Nageotte has invaluable information regarding trademark priority, analogous use, and Bluewater Key RV Ownership Park Owners Association, Inc.'s history with Rita Clark d/b/a Bluewater Rentals. *See* Nageotte Decl. ¶¶ 11-14.

III. CONCLUSION

For the foregoing reasons, Applicant/Petitioner requests that the Trademark Trial and Appeal Board grant Applicant/Petitioner's motion for leave to take a video teleconference testimony deposition of Ronald Lacroix, a video teleconference discovery deposition of James Mazurek, a video teleconference testimony deposition of James Mazurek, and a telephonic discovery deposition of Richard Nageotte.

Date: January 24, 2014


Arlen L. Olsen, Esq.

Autondria S. Minor, Esq.
Attorneys for Opposers
SCHMEISER, OLSEN & WATTS, LLP
22 Century Hill Drive, Suite 302
Latham, New York 12110
Tel: (518) 220-1850
Fax: (518) 220-1857

CERTIFICATE OF SERVICE

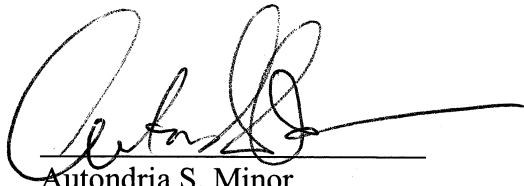
I hereby certify that a true and correct copy of the foregoing **MOTION FOR LEAVE TO TAKE VIDEO TELECONFERENCE DISCOVERY DEPOSITIONS AND/OR TELEPHONIC DISCOVERY DEPOSITIONS** was served by USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 21st day of January 2014.

A handwritten signature in black ink, appearing to read 'Autondria S. Minor', is written over a horizontal line.

Autondria S. Minor
Attorney for Opposers
SCHMEISER, OLSEN & WATTS, LLP
22 Century Hill Drive, Suite 302
Latham, New York 12110
Tel: (518) 220-1850
Fax: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION FOR LEAVE TO TAKE VIDEO TELECONFERENCE DISCOVERY DEPOSITIONS AND/OR TELEPHONIC DISCOVERY DEPOSITIONS** was served by USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 21st day of January 2014.

A handwritten signature in black ink, appearing to read 'Autondria S. Minor', is written over a horizontal line.

Autondria S. Minor
Attorney for Opposers
SCHMEISER, OLSEN & WATTS, LLP
22 Century Hill Drive, Suite 302
Latham, New York 12110
Tel: (518) 220-1850
Fax: (518) 220-1857

DECLARATION OF RONALD LACROIX

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a)	
BLUEWATER RENTALS)	
)	
Opposer,)	Opposition/ Cancellation No. 91209747
v.)	
)	
BLUEWATER KEY RV OWNERSHIP)	
PARK PROPERTY OWNERS)	
ASSOCIATION, INC.,)	
)	
Applicant)	
)	
BLUEWATER KEY RV OWNERSHIP)	
PARK PROPERTY OWNERS)	
ASSOCIATION, INC.,)	
)	
Petitioner,)	
v.)	
)	
CLARK, RITA M. d/b/a)	
BLUEWATER RENTALS)	
)	
Respondent.)	
)	

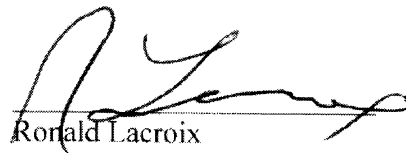
**DECLARATION OF RONALD LACROIX IN SUPPORT OF MOTION FOR LEAVE TO
TAKE VIDEO TELECONFERENCE DISCOVERY DEPOSITIONS AND/OR
TELEPHONIC DISCOVERY DEPOSITIONS**

1. My name is Ronald Lacroix. I make this declaration in support of the motion for leave to conduct discovery depositions by video teleconference and/or telephonic means.
2. I am one of the earliest members of the Bluewater Key RV Ownership Park Owners Association, Inc.
3. I purchased the first lot in Bluewater Key RV Ownership Park.

4. I am currently the Vice President of Bluewater Key RV Ownership Park Owners Association, Inc.
5. I am knowledgeable about the early years of Bluewater Key RV Ownership Park Owners Association, Inc.
6. I am a Canadian citizen.
7. I am visiting Bluewater Key RV Ownership Park in Key West, Florida from January 9, 2014 to April 25, 2014.
8. I will be available during the discovery period for in-person discovery depositions.
9. After April 25, 2014, I will return to my permanent residence in Quebec, Canada.
10. Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. is located in Key West, Florida and I live more than two-thousand miles from Key West, Florida.
11. I am willing to submit to a testimony deposition by video teleconference.
12. I would prefer to have my testimony deposition conducted by video teleconference deposition in Quebec, Canada rather than flying to Key West, Florida from Quebec, Canada for an in-person testimony deposition.
13. Conducting my testimony deposition by video teleconference will reduce travel costs in the proceeding.
14. The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any resulting registration therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Date:

Jun 10, 2014


Ronald Lacroix

MAZUREK DECLARATION

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

**DECLARATION OF JAMES MAZUREK IN SUPPORT OF MOTION FOR LEAVE TO
TAKE VIDEO TELECONFERENCE DISCOVERY DEPOSITIONS AND/OR
TELEPHONIC DISCOVERY DEPOSITIONS**

- 1

4. As a former president and former member of the Board of Directors, I have knowledge of Bluewater Key RV Ownership Park Owners Association, Inc.'s use of trademark use and analogous use of trademarks.
5. I also have knowledge of Bluewater Key RV Ownership Park Owners Association, Inc.'s history with Rita Clark d/b/a Bluewater Rentals.
6. Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. is located in Key West, Florida.
7. Applicant/Petitioner Bluewater Key RV Ownership Park Owners Association, Inc. is a corporation with a principal place of business in Key West, Florida.
8. I live in Harrison Township, Michigan.
9. I live over one thousand miles from Key West, Florida.
10. My health is failing. My health makes it difficult for me to travel over one thousand miles to Key West, Florida and participate in an in-person discovery deposition or in-person testimony deposition in Key West, Florida.
11. If the Trademark Trial and Appeal Board orders that my discovery deposition and testimony deposition may be conducted by video teleconference means, then the order will relieve me from having to travel over one thousand miles when I am in poor health.
12. Allowing me to participate in the discovery deposition and testimony deposition via video teleconference will reduce litigation travel costs.
13. The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any resulting registration therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Date: _____

1-15-14


James Mazurek

DECLARATION OF RICHARD NAGEOTTE

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a)	
BLUEWATER RENTALS)	
)	
Opposer,)	Opposition/ Cancellation No. 91209747
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BLUEWATER KEY RV OWNERSHIP)	
PARK PROPERTY OWNERS)	
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)	
Applicant)	
)	
BLUEWATER KEY RV OWNERSHIP)	
PARK PROPERTY OWNERS)	
ASSOCIATION, INC.,)	
)	
Petitioner,)	
v.)	
)	
CLARK, RITA M. d/b/a)	
BLUEWATER RENTALS)	
)	
Respondent.)	
)	

**DECLARATION OF RICHARD NAGEOTTE IN SUPPORT OF MOTION FOR LEAVE
TO TAKE VIDEO TELECONFERENCE DISCOVERY DEPOSITIONS AND/OR
TELEPHONIC DISCOVERY DEPOSITIONS**

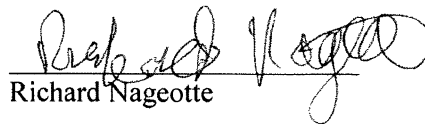
1. My name is Richard Nageotte. I make this declaration in support of the motion for leave to conduct discovery depositions by video teleconference and/or telephonic means.
2. Initially, I purchased Lot 53 in Bluewater Key RV Ownership Park. I subsequently purchased Lot 52.

3. As an owner of lots in Bluewater Key RV Ownership Park, I became a member of the Bluewater Key RV Ownership Park Owners Association, Inc.
4. I served as a former member of the Board of Directors for Bluewater Key RV Ownership Park Owners Association, Inc.
5. Currently, I own lots 52 and 53 in Bluewater Key RV Ownership Park.
6. Today, I am still a member of the Bluewater Key RV Ownership Park Owners Association, Inc.
7. I am formerly the Vice President of Bluewater Key RV Ownership Park Owners Association, Inc.
8. I am an attorney by profession and I am a stockholder of Nageotte, Nageotte, and Nageotte, P.C. in Stafford, Virginia.
9. I live in Stafford, Virginia; however, I am leaving the country in January for four (4) months.
10. I will return to the United States May 20, 2014.
11. I will be on a ship and it will be impossible to conduct a video teleconference deposition.
12. I have information regarding Bluewater Key RV Ownership Park Owners Association, Inc.'s history with Rita Clark d/b/a Bluewater Rentals.
13. I have knowledge of Bluewater Key RV Ownership Park Owners Association, Inc.'s use of trademarks.
14. I have knowledge of Bluewater Key RV Ownership Park Owners Association, Inc.'s highway advertisement sign and other advertisements.
15. The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any resulting registration therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Date: _____

1/8/14

Richard Nageotte



**EXHIBIT K OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Monday, December 02, 2013 3:43 PM
To: 'De Biase, Michael'
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

You may contact me today before 4:30pm regarding your dates and times of availability for next week through the close of discovery on December 20, 2013. Otherwise, you may just send us a quick email. Your prompt response is greatly appreciated. Thanks so much.

Sincerely,

Autondria S. Minor
Autondria S. Minor
Schmeiser, Olsen & Watts
22 Century Hill Drive, Suite 302
Latham, NY 12110
Telephone: (518) 220-1850 (Ext. 317)
Facsimile: (518) 220-1857

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From: De Biase, Michael [mailto:MDeBiase@bplegal.com]
Sent: Monday, December 02, 2013 3:17 PM
To: Dianne Pomonis
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase
Attorney at Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525

12/31/2013

Tel: 954.985.4145 | Fax: 954.985.4176 | [E-Mail](#)

Park Place | 311 Park Place Boulevard, Suite 250 | Clearwater, FL 33759

Tel: 727.712.4000 | Fax: 727.796.1484

[Website](#)

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From: Dianne Pomonis [dpomonis@iplawusa.com]

Sent: Monday, December 02, 2013 10:14 AM

To: Markow, Kevin; De Biase, Michael

Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello

Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As you can appreciate, diligent efforts are being made to accommodate all parties concerning the depositions in a timely manner. In order to re-notice the witnesses expeditiously before close of discovery, we will now need to finalize the schedule. Kindly reply with your available dates so that we may coordinate the schedule and re-notice today.

We had previously inquired about depositions by video conference, however, please note, some witnesses must be deposed by **"telephone only"** as their access to the minimal technology requirements for a video conference vary greatly. Kindly advise whether you have any objections to those restrictions. Thank you.

Regards,

Dianne Pomonis

Legal Administrative Assistant to

Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.

SCHMEISER OLSEN & WATTS LLP

22 Century Hill Drive | Suite 302

Latham, New York 12110

Tel: (518) 220-1850 | Fax: (518) 220-1857

Website: <mailto:www.iplawusa.com>

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12/31/2013

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From: Dianne Pomonis
Sent: Wednesday, November 27, 2013 2:29 PM
To: 'Markow, Kevin'; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As a follow up to our November 25th email, please be advised, we have not received your availability in order for us to coordinate and re-notice the witnesses. Please advise at your earliest convenience.

Should you have any questions, please do not hesitate to contact the office.

Thanking you in advance for your prompt response to this request.

Regards,

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
22 Century Hill Drive | Suite 302
Latham, New York 12110
Tel: (518) 220-1850 | Fax: (518) 220-1857
Website: <mailto:www.iplawusa.com>

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From: Dianne Pomonis
Sent: Tuesday, November 26, 2013 9:11 AM
To: 'Markow, Kevin'
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. Markow:

12/31/2013

Thank you for your email.

Yes, as our notices indicated, we are attempting to find a mutually agreed upon schedule for all parties concerned. To clarify, we chose those dates assuming there would be some conflict on both sides but needed to get the ball rolling due to the tight time restraints.

As we will need at least a minimum of two days turnaround for deposition transcription, could you kindly provide us with your schedule during the dates of December 3rd through December 17th? We will then attempt to coordinate your schedule with that of the witnesses, clear the available dates with your office and renotice.

Thanking you in advance.

Kind regards,

Dianna

From: Markow, Kevin [mailto:KMARKOW@bplegal.com]
Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Kindly clear the new proposed dates with our office prior to renoticing. We too have conflicts with the dates and times your office unilaterally scheduled (though we assume you just wanted to get the notices out and would be amenable to scheduling around conflicts). Thx.

Sent from my iPad

Kevin Markow

Attorney at Law
Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](mailto:CARE@bplegal.com)
[Website](#)

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Our clients' total satisfaction is our #1 priority. The Becker & Poliakoff **Client CARE Center** is available for questions, concerns and suggestions. Please contact us at 954.364.6090 or via email at CARE@bplegal.com.
On Nov 25, 2013, at 1:39 PM, "Dianne Pomonis" <dpomonis@iplawusa.com> wrote:

12/31/2013

Dear Counsels:

Due to the diverse locations of counsel and witnesses, we believe it would be prudent as well as cost effective for all parties to hold depositions by video teleconference. Please let us know if you consent to video teleconference depositions. Upon your approval and consent, we will send the amended Notices reflecting the update.

The proposed video teleconference depositions would be initiated here in our NY office and conducted through Webex Audio Conference via computer. The minimum technical requirements for a video teleconference are as follows:

- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

December 11, 2013	December 12, 2013	December 13, 2013
Delores Zickert at 9:00 a.m.	Ronald Lacroix at 9:00am-10:30am	Suellen Schwobel at 9:00am-10:30am
Catherine Good Duncan at 2:00 p.m.	Donna Eisentraut at 11:00am - 1:00 pm	Carl Schwobel at 11:00 am-1:00pm
	James Mazurek at 2:30 pm until completion	

****The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.**

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

Telephone: (518) 220-1850 (Ext. 317)

Facsimile: (518) 220-1857

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MINOR DECLARATION

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a)	
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PARK PROPERTY OWNERS)	
ASSOCIATION, INC.,)	
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Petitioner,)	
v.)	
)	
CLARK, RITA M. d/b/a)	
BLUEWATER RENTALS)	
)	
Respondent.)	
)	

1. My name is Autondria Minor. I am an attorney at the law firm of Schmeiser, Olsen & Watts, LLP. My firm represents Applicant/Petitioner, Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant/Petitioner") in this proceeding. I make this declaration in support of the motion for leave to conduct discovery depositions by video teleconference and/or telephonic means.

2. On March 13, 2013, attorneys for Opposer/Respondent Rita Clark d/b/a Bluewater Rentals (“Opposer/Respondent”) filed a Notice of Opposition against Applicant/Petitioner.
3. On March 13, 2013, the Trademark Trial and Appeal Board issued an initial scheduling order.
4. According to the initial scheduling order of March 13, 2013, the deadline for Applicant/Petitioner to answer the Notice of Opposition was April 22, 2013.
5. On April 18, 2013, attorneys for Applicant/Petitioner filed an Answer to Notice of Opposition and Counterclaim for Petition to Cancel.
6. On April 24, 2013, the Trademark Trial and Appeal Board issued a second scheduling order, which encompassed scheduling dates for opposition claims in the Notice of Opposition and scheduling dates for a new cancellation counterclaim in the Answer to Notice of Opposition and Counterclaim for Petition to Cancel.
7. Under the second scheduling order of April 24, 2013, the answer to the cancellation counterclaim was due on May 24, 2013.
8. On May 23, 2013, attorneys for Opposer/Respondent filed Opposer’s Answer and Affirmative Defenses to Applicant’s Counterclaim for Petition to Cancel.
9. The attorneys for the parties held a discovery conference and exchanged initial disclosures.
10. On August 8, 2013, attorneys for Applicant/Petitioner served admission requests.
11. On August 12, 2013, attorneys for Applicant/Petitioner served interrogatories and production requests.
12. On September 6, 2013, attorneys for Opposer/Respondent filed a motion to extend the time to respond to discovery.
13. In the motion of September 6, 2013, attorneys for Opposer/Respondent requested an extension until September 27, 2013.
14. In a decision of October 10, 2013, the Trademark Trial and Appeal Board granted the motion for extension of time, filed by attorneys for Opposer/Respondent.
15. In the decision of October 10, 2013, the Trademark Trial and Appeal Board indicated that all trial dates would remain the same.

16. After attorneys for Applicant/Petitioner made numerous requests for outstanding discovery, attorneys for Applicant/Petitioner received a discovery CD from attorneys for Opposer/Respondent on November 19, 2013.
17. On November 21, 2013, attorneys for Applicant/Petitioner mailed overnight notices of discovery depositions for six fact witnesses¹. *See* Ex. A.
18. On November 22, 2013, attorneys for Applicant/Petitioner emailed copies of the six notices of discovery depositions to attorneys for Opposer/Respondent. *See* Ex. A.
19. On November 22, 2013, attorneys for Applicant/Petitioner also mailed overnight two more notices of discovery depositions for fact witnesses. *See* Ex. D.
20. The notices from attorneys for Applicant/Petitioner indicated that the discovery depositions may be changed to a mutually agreeable time and location. *See* Exs. A-D.
21. On November 25, 2013, attorneys for Applicant/Petitioner inquired as to whether attorneys for Opposer/Respondent would consent to video teleconference depositions, which would be prudent and cost effective for all parties. *See* Ex. E.
22. Attorneys for Applicant/Petitioner sought to depose some witnesses, who were out of the State of Florida and/or out of the United States.
23. The email of November 25, 2013 sent by attorneys for Applicant/Petitioner referred to proposed dates of December 11, 2013, December 12, 2013, and December 13, 2013 for discovery depositions. *See* Ex. E.
24. On November 25, 2013, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent had conflicts with the dates in the email of November 25, 2013. *See* Ex. F.
25. Attorneys for Opposer/Respondent did not specify which dates were in conflict. *See* Ex. F.
26. On November 26, 2013, attorneys for Applicant/Petitioner emailed attorneys for Opposer/Respondent, indicating that attorneys for Applicant/Petitioner were attempting to find a mutually agreed upon schedule for all parties concerned. *See* Ex. G.

¹ On November 22, 2013, attorneys for Applicant/Petitioner amended the notice of deposition for Donna Eisentraut and provided a signed certificate of service for notice of deposition of Carl Schwobel. *See* Exs. B, C.

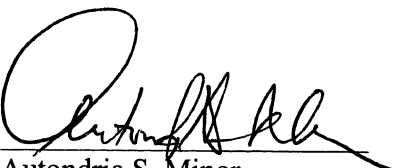
27. In the email of November 26, 2013, attorneys for Applicant/Petitioner requested the availability of attorneys for Opposer/Respondent for discovery depositions during the dates of December 3, 2013 to December 17, 2013. *See* Ex. G.
28. On November 27, 2013, attorneys for Applicant/Petitioner sent a follow up email to attorneys for Opposer/Respondent. *See* Ex. H.
29. In the email of November 27, 2013, attorneys for Applicant/Petitioner indicated that attorneys for Applicant/Petitioner had not received any available dates to re-notice discovery depositions for the witnesses. *See* Ex. H.
30. Attorneys for Opposer/Respondent were unresponsive. *See* Ex. I.
31. On December 2, 2013, attorneys for Applicant/Petitioner sent a follow up email to attorneys for Opposer/Respondent. *See* Ex. I.
32. In the email of December 2, 2013, attorneys for Applicant/Petitioner again requested available dates from attorneys for Opposer/Respondent regarding discovery depositions. *See* Ex. I.
33. On December 2, 2013, attorneys for Applicant/Petitioner inquired about conducting some discovery depositions by video teleconference and conducting other discovery depositions only by telephonic means. *See* Ex. I.
34. On December 2, 2013, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent would like to hold a teleconference between 3:00pm and 5:30pm on December 2, 2013. *See* Ex. J.
35. On December 2, 2013, attorneys for Applicant/Petitioner indicated that a teleconference could be held before 4:30pm on December 2, 2013 or attorneys for Opposer/Respondent could merely email the availability information to attorneys for Applicant/Petitioner. *See* Ex. K.
36. At 5:00pm on December 2, 2013, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent were unable to hold the teleconference. *See* Ex. L.
37. No availability information regarding discovery depositions was provided by attorneys for Opposer/Respondent on December 2, 2013. *See* Ex. L.
38. Further, attorneys for Opposer/Respondent provided no information as to whether attorneys for Opposer/Respondent would consent to discovery depositions by video teleconference means or telephonic means. *See* Ex. L.

39. On December 3, 2013, attorneys for Opposer/Respondent sent an email, inquiring as to when attorneys for Applicant/Petitioner would be available for a teleconference on December 3, 2013 to discuss the scheduling of discovery depositions. *See* Ex. M.
40. On December 3, 2013, attorneys for Applicant/Petitioner responded to the email of December 3, 2013 from attorneys for Opposer/Respondent. *See* Ex. N.
41. Attorneys for Applicant/Petitioner responded that the attorneys for the parties could hold a teleconference before 3:00 pm on December 3, 2013. *See* Ex. N.
42. In the email of December 3, 2013, attorneys for Applicant/Petitioner also indicated that otherwise, the dates and times could be emailed by attorneys for Opposer/Respondent to attorneys for Applicant/Petitioner. *See* Ex. N.
43. On December 3, 2013, attorneys for Opposer/Respondent held a teleconference with attorneys for Applicant/Petitioner. *See* Exs. O, P.
44. In the teleconference of December 3, 2013, attorneys for Opposer/Respondent requested a ninety days extension of the discovery period. *See* Ex. Q.
45. On December 3, 2013, for the first time, attorneys for Opposer/Respondent indicated that attorneys for Opposer/Respondent wanted to take discovery depositions. *See* Ex. Q.
46. Attorneys for Opposer/Respondent indicated that conducting so many discovery depositions close to the end of discovery would be impractical. *See* Ex. Q.
47. Prior to December 3, 2013, attorneys for Opposer/Respondent had not noticed any discovery depositions. *See* Ex. Q.
48. Further, prior to December 3, 2013, attorneys for Opposer/Respondent had not propounded any interrogatories, production requests, or admission requests upon Applicant/Petitioner.
49. Attorneys for Opposer/Respondent were well aware of the previous deadline of December 20, 2013 for the close of discovery because attorneys for Applicant/Petitioner often referenced the previous discovery deadline of December 20, 2013 in correspondences to attorneys for Opposer/Respondent regarding outstanding discovery.
50. On December 3, 2013, attorneys for Applicant/Petitioner sent another email to counsel for Opposer/Respondent again requesting dates of availability for discovery depositions prior to the previous deadline for close of discovery. *See* Ex. Q.

51. On December 3, 2013, attorneys for Applicant/Petitioner indicated that the Trademark Trial and Appeal Board did not currently have before it a motion for extension of the discovery period and the Trademark Trial and Appeal Board had not granted a motion to extend the discovery period. *See* Ex. Q.
52. Attorneys for Applicant/Petitioner indicated that attorneys for Applicant/Petitioner wanted to be cautious and re-notice discovery depositions in light of the fact that no motion for an extension of the discovery period was currently before the Trademark Trial and Appeal Board for approval and there was no current order to extend the discovery period. *See* Ex. Q.
53. From November 22, 2013 to December 20, 2013, attorneys for Opposer/Respondent did not provide a single date, which opposing counsel for Opposer/Respondent would be available for discovery depositions. *See* Exs. A-Q.
54. On December 9, 2013, attorneys for Applicant/Petitioner agreed to extend the discovery period ninety days. *See* Exs. R, S.
55. A motion for an extension of time was filed with the Trademark Trial and Appeal Board on December 11, 2013.
56. The motion requested that the Trademark Trial and Appeal Board extend the discovery period ninety days and re-set the remaining dates in the second Scheduling Order.
57. On December 11, 2013, the motion for a ninety days extension was granted by the Trademark Trial and Appeal Board.
58. Attorneys for Opposer/Respondent have been unresponsive to any requests to conduct depositions by video teleconference or telephone. *See* Exs. E-Q.
59. To date, the parties have not entered into any stipulations regarding conducting discovery depositions by video teleconference or telephonic means.
60. A true and correct copy of cases, cited in this motion for leave, but not published in The United States Patent Quarterly 2d Series are attached as Exhibits T-Z and Exhibits AA-CC. *See* Exs. T-Z; Exs. AA-CC.
61. The undersigned being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any resulting registration therefrom, declares that all statements made of

his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Date: January 10, 2013


Autondria S. Minor

**EXHIBIT A OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Friday, November 22, 2013 9:50 AM
To: De Biase, Michael; Markow, Kevin
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: DISCOVERY | Our Ref No | BLUE.50557-NY

Re: U.S. Serial No. : 85/644,802
U.S. Filing Date : June 6, 2012
Title : Opposition against U.S. Trademark Application 85/644,802 for
Bluewater Key/Cancellation of U.S. Trademark Registration No.
4,274,836 for Bluewater Rentals
Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
Our Ref : BLUE.50557-NY
Working Attorney : ALO/ASM
Re: U.S. Serial No. : 85/644,802

Dear Messrs. De Biase and Markow:

Please find attached an electronic courtesy copy of correspondence sent to your office via overnight delivery on November 21, 2013 in connection with Discovery in above-referenced matter.

Kind regards,

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
22 Century Hill Drive | Suite 302
Latham, New York 12110
Tel: (518) 220-1850 | Fax: (518) 220-1857
Website: <mailto:www.iplawusa.com>

This message contains information intended only for the use of the addressee(s) named above and may contain information that is legally privileged. If you are not the addressee, or the person responsible for delivering it to the addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify us by replying to the message and delete the original message immediately thereafter. Thank you.

**ATTORNEY-CLIENT, COMMUNITY OF INTEREST PRIVILEGE AND/OR WORK PRODUCT PRIVILEGED
COMMUNICATION**

This communication is protected by the attorney-client, community of interest privilege and/or the work product privilege and should be treated in a confidential manner. Any disclosure to other than key management personnel on a need-to-know basis may jeopardize the privilege and require disclosure to adverse parties in litigation.

12/31/2013



SCHMEISER, OLSEN & WATTS LLP
PATENTS, TRADEMARKS & COPYRIGHTS

22 CENTURY HILL DRIVE, SUITE 302, LATHAM, NEW YORK 12110
Tel 518-220-1850 ♦ Fax 518-220-1857 ♦ NY@iplawusa.com ♦ www.iplawusa.com

aminor@iplawusa.com

November 21, 2013

VIA EXPRESS MAIL OVERNIGHT

Kevin Markow, Esq.
Attention: Michael N. De Biase, Esq.
Becker & Poliakoff, P.A.
3111 Stirling Road
Fort Lauderdale, Florida 33312-6525

Re: U.S. Serial No. : 85/644,802
U.S. Filing Date : June 6, 2012
Title : Opposition against U.S. Trademark Application 85/644,802 for
Bluewater Key/Cancellation of U.S. Trademark Registration
No. 4,274,836 for Bluewater Rentals
Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
Our Ref : BLUE.50557-NY
Working Attorney : ALO/ASM

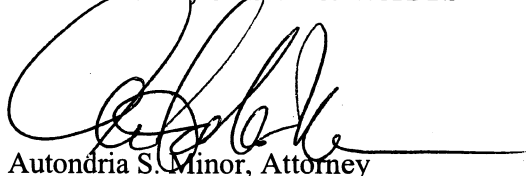
Dear Messrs. De Biase and Mazurek:

Please find enclosed herewith our Notices of Deposition in connection with the above-referenced matter.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

SCHMEISER, OLSEN & WATTS



Autondria S. Minor, Attorney

ASM :dp

Encl.

cc: Client (via email)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Opposer,
v.

Opposition No. 91209747

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Applicant

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Petitioner,
v.

Cancellation No. _____

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Respondent.

NOTICE OF DISCOVERY DEPOSITION

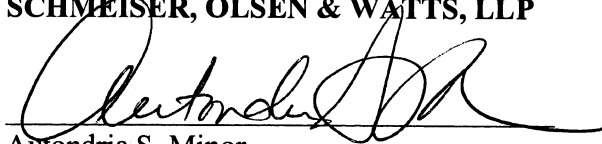
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant", "Applicant/Petitioner", "Bluewater Key") will take the

discovery deposition of Donna Eisentraut. The deposition will take place on December 13, 2013 at 11:00 am - 1:00 pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in black ink, appearing to read "Autondria S. Minor", is written over a horizontal line.

Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

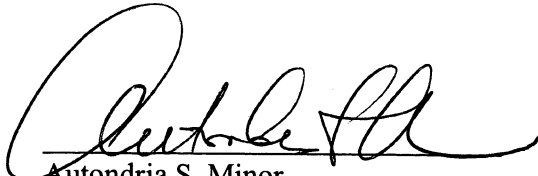
Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF DISCOVERY DEPOSITION** was served by electronic mail and/or USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 21st day of November 2013.


Autondria S. Minor

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Applicant

BLUEWATER KEY RV OWNERSHIP
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ASSOCIATION, INC.,

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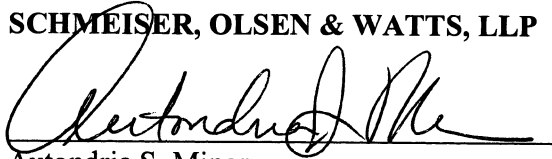
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. (“Applicant”, “Applicant/Petitioner”, “Bluewater Key”) will take the

discovery deposition of James Mazurek. The deposition will take place on December 12, 2013 at 2:30 pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

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Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

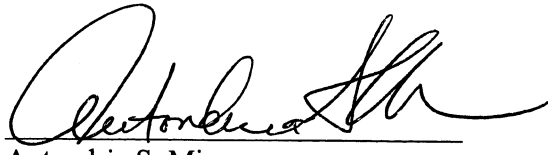
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Autondria S. Minor

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ASSOCIATION, INC.,

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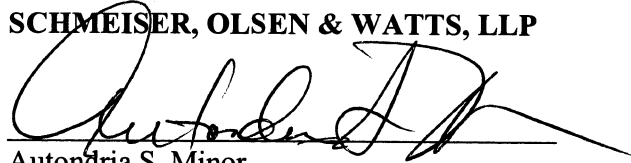
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant", "Applicant/Petitioner", "Bluewater Key") will take the

discovery deposition of Ronald Lacroix. The deposition will take place on December 12, 2013 at 9:00 am -10:30 am in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

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Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

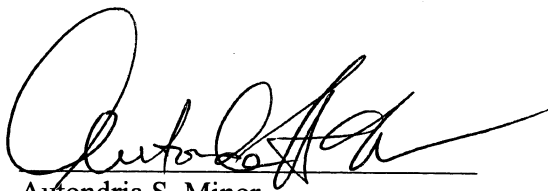
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Autondria S. Minor



SCHMEISER, OLSEN & WATTS LLP
PATENTS, TRADEMARKS & COPYRIGHTS

22 CENTURY HILL DRIVE, SUITE 302, LATHAM, NEW YORK 12110
Tel 518-220-1850 ♦ Fax 518-220-1857 ♦ NY@iplawusa.com ♦ www.iplawusa.com

aminor@iplawusa.com

November 21, 2013

VIA EXPRESS MAIL OVERNIGHT

Kevin Markow, Esq.
Attention: Michael N. De Biase, Esq.
Becker & Poliakoff, P.A.
3111 Stirling Road
Fort Lauderdale, Florida 33312-6525

Re: U.S. Serial No. : 85/644,802
U.S. Filing Date : June 6, 2012
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No. 4,274,836 for Bluewater Rentals
Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
Our Ref : BLUE.50557-NY
Working Attorney : ALO/ASM

Dear Messrs. De Biase and Mazurek:

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Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

SCHMEISER, OLSEN & WATTS

Autondria S. Minor, Attorney

ASM :dp

Encl.

cc: Client (via email)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Applicant

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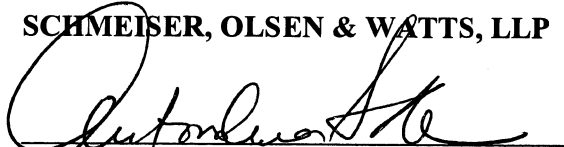
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. (“Applicant”, “Applicant/Petitioner”, “Bluewater Key”) will take the

discovery deposition of Suellen Schwobel. The deposition will take place on December 13, 2013 at 9:00 am -10:30 am in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

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Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

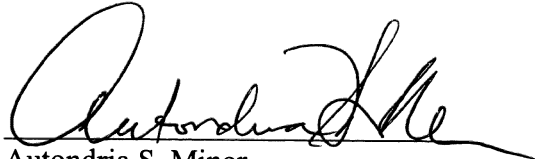
Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

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Autondria S. Minor

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BLUEWATER KEY RV OWNERSHIP
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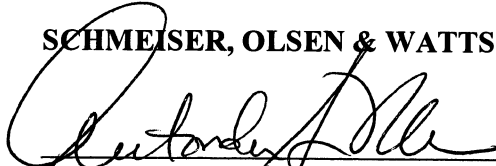
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant", "Applicant/Petitioner", "Bluewater Key") will take the

discovery deposition of Richard Nageotte. The deposition will take place on December 13, 2013 at 2:30 pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in black ink, appearing to read "Autondria S. Minor", is written over a horizontal line.

Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

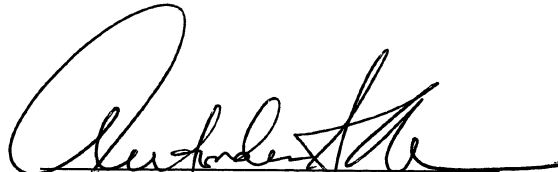
Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF DISCOVERY DEPOSITION** was served by electronic mail and/or USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 21st day of November 2013.


Autondria S. Minor

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Opposer,
v.

Opposition No. 91209747

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Applicant

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Petitioner,
v.

Cancellation No. _____

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Respondent.

NOTICE OF DISCOVERY DEPOSITION

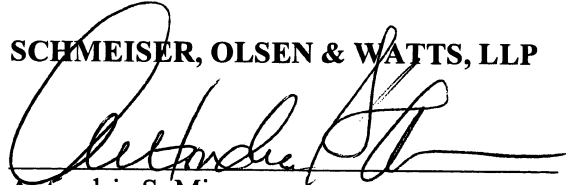
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant", "Applicant/Petitioner", "Bluewater Key") will take the

discovery deposition of Carl Schwobel. The deposition will take place on December 13, 2013 at 11:00 am - 1:00 pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in black ink, appearing to read 'Autondria S. Minor', is written over a horizontal line.

Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF DISCOVERY DEPOSITION** was served by electronic mail and/or USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 21st day of November 2013.

Autondria S. Minor

**EXHIBIT B OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Friday, November 22, 2013 12:39 PM
To: De Biase, Michael; Markow, Kevin
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: DISCOVERY - AMENDED DEPOSITION NOTICE | Our Ref No. BLUE.50557-NY

Re: U.S. Serial No. : 85/644,802
 U.S. Filing Date : June 6, 2012
 Title : Opposition against U.S. Trademark Application 85/644,802 for
 Bluewater Key/Cancellation of U.S. Trademark Registration No.
 4,274,836 for Bluewater Rentals
 Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
 Our Ref : BLUE.50557-NY
 Working Attorney : ALO/ASM
 Re: U.S. Serial No. : 85/644,802

Dear Messers. De Biase and Markow:

Please find attached an amended Notice of Deposition for Donna Eisentraut.

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
 22 Century Hill Drive | Suite 302
 Latham, New York 12110
 Tel: (518) 220-1850 | Fax: (518) 220-1857
 Website: <mailto:www.iplawusa.com>

This message contains information intended only for the use of the addressee(s) named above and may contain information that is legally privileged. If you are not the addressee, or the person responsible for delivering it to the addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify us by replying to the message and delete the original message immediately thereafter. Thank you.

**ATTORNEY-CLIENT, COMMUNITY OF INTEREST PRIVILEGE AND/OR WORK PRODUCT PRIVILEGED
 COMMUNICATION**

This communication is protected by the attorney-client, community of interest privilege and/or the work product privilege and should be treated in a confidential manner. Any disclosure to other than key management personnel on a need-to-know basis may jeopardize the privilege and require disclosure to adverse parties in litigation.



SCHMEISER, OLSEN & WATTS LLP
PATENTS, TRADEMARKS & COPYRIGHTS

22 CENTURY HILL DRIVE, SUITE 302, LATHAM, NEW YORK 12110
Tel 518-220-1850 ♦ Fax 518-220-1857 ♦ NY@iplawusa.com ♦ www.iplawusa.com

aminor@iplawusa.com

November 22, 2013

Kevin Markow, Esq.
Attention: Michael N. De Biase, Esq.
Becker & Poliakoff, P.A.
3111 Stirling Road
Fort Lauderdale, Florida 33312-6525

Re: U.S. Serial No. : 85/644,802
U.S. Filing Date : June 6, 2012
Title : Opposition against U.S. Trademark Application 85/644,802 for
Bluewater Key/Cancellation of U.S. Trademark Registration
No. 4,274,836 for Bluewater Rentals
Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
Our Ref : BLUE.50557-NY
Working Attorney : ALO/ASM

Dear Messers. De Biase and Markow:

Please find enclosed herewith an Amended Notice of Deposition for Donna Eisentraut in connection with the above-referenced matter.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

SCHMEISER, OLSEN & WATTS

/S/AUTONDRIA S. MINOR
Autondria S. Minor, Attorney
ASM :dp
Encl.
cc: *Client (via email)*

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Opposer,
v.

Opposition No. 91209747

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Applicant

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Petitioner,
v.

Cancellation No. _____

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Respondent.

AMENDED NOTICE OF DISCOVERY DEPOSITION

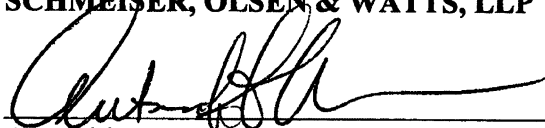
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant", "Applicant/Petitioner", "Bluewater Key") will take the

discovery deposition of Donna Eisentraut. The deposition will take place on December 12, 2013 at 11:00 am - 1:00 pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 22, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in dark ink, appearing to read 'Autondria S. Minor', is written over a horizontal line.

Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

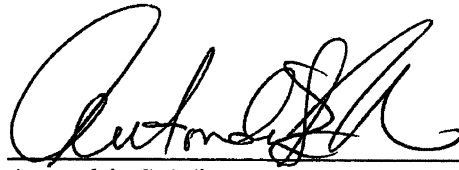
Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF DISCOVERY DEPOSITION** was served by electronic mail and/or USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 22nd day of November 2013.

A handwritten signature in black ink, appearing to read 'Autondria S. Minor', written over a horizontal line.

Autondria S. Minor

**EXHIBIT C OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Friday, November 22, 2013 1:16 PM
To: De Biase, Michael; Markow, Kevin
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: DISCOVERY | Our Ref No. BLUE 50557-NY

Re: U.S. Serial No. : 85/644,802
 U.S. Filing Date : June 6, 2012
 Title : Opposition against U.S. Trademark Application 85/644,802 for
 Bluewater Key/Cancellation of U.S. Trademark Registration No.
 4,274,836 for Bluewater Rentals
 Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
 Our Ref : BLUE.50557-NY
 Working Attorney : ALO/ASM
 Re: U.S. Serial No. : 85/644,802

Please find deposition Notice for Carl Schwobel attached.

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
 22 Century Hill Drive | Suite 302
 Latham, New York 12110
 Tel: (518) 220-1850 | Fax: (518) 220-1857
 Website: <mailto:www.iplawusa.com>

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**ATTORNEY-CLIENT, COMMUNITY OF INTEREST PRIVILEGE AND/OR WORK PRODUCT PRIVILEGED
 COMMUNICATION**

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Opposer,
v.

Opposition No. 91209747

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Applicant

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Petitioner,
v.

Cancellation No. _____

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Respondent.

NOTICE OF DISCOVERY DEPOSITION

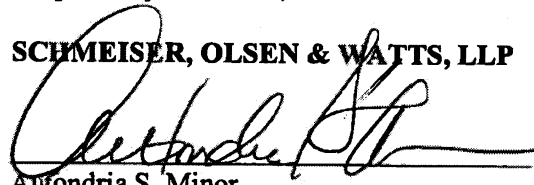
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. ("Applicant", "Applicant/Petitioner", "Bluewater Key") will take the

discovery deposition of Carl Schwobel. The deposition will take place on December 13, 2013 at 11:00 am - 1:00 pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 21, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in black ink, appearing to read 'Arlen L. Olsen', is written over a horizontal line.

Aufondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF DISCOVERY DEPOSITION** was served by electronic mail and/or USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 21st day of November 2013.


Autondria S. Minor

**EXHIBIT D OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Friday, November 22, 2013 3:06 PM
To: De Biase, Michael; Markow, Kevin
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: DISCOVERY | Our Ref No BLUE.50557-NY

Re: U.S. Serial No. : 85/644,802
 U.S. Filing Date : June 6, 2012
 Title : Opposition against U.S. Trademark Application 85/644,802 for
 Bluewater Key/Cancellation of U.S. Trademark Registration No.
 4,274,836 for Bluewater Rentals
 Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
 Our Ref : BLUE.50557-NY
 Working Attorney : ALO/ASM
 Re: U.S. Serial No. : 85/644,802

Please find Deposition Notices for Delores Zickert and Catherine Good-Duncan in connection with the above-referenced matter. Copies are simultaneously being mailed by U.S. Postal Service to your office today.

Kind regards,

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
 22 Century Hill Drive | Suite 302
 Latham, New York 12110
 Tel: (518) 220-1850 | Fax: (518) 220-1857
 Website: <mailto:www.iplawusa.com>

This message contains information intended only for the use of the addressee(s) named above and may contain information that is legally privileged. If you are not the addressee, or the person responsible for delivering it to the addressee, you are hereby notified that reading, disseminating, distributing or copying this message is strictly prohibited. If you have received this message by mistake, please immediately notify us by replying to the message and delete the original message immediately thereafter. Thank you.

ATTORNEY-CLIENT, COMMUNITY OF INTEREST PRIVILEGE AND/OR WORK PRODUCT PRIVILEGED COMMUNICATION

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SCHMEISER, OLSEN & WATTS LLP
PATENTS, TRADEMARKS & COPYRIGHTS

22 CENTURY HILL DRIVE, SUITE 302, LATHAM, NEW YORK 12110
Tel 518-220-1850 ♦ Fax 518-220-1857 ♦ NY@iplawusa.com ♦ www.iplawusa.com

aminor@iplawusa.com

November 22, 2013

Kevin Markow, Esq.
Attention: Michael N. De Biase, Esq.
Becker & Poliakoff, P.A.
3111 Stirling Road
Fort Lauderdale, Florida 33312-6525

Re: U.S. Serial No. : 85/644,802
U.S. Filing Date : June 6, 2012
Title : Opposition against U.S. Trademark Application 85/644,802 for
Bluewater Key/Cancellation of U.S. Trademark Registration
No. 4,274,836 for Bluewater Rentals
Applicant : Bluewater Key RV Ownership Park Owners Association, Inc.
Our Ref : BLUE.50557-NY
Working Attorney : ALO/ASM

Dear Messers. De Biase and Mazurek:

Please find enclosed herewith our Notices of Deposition for Delores Zickert and Catherine Good-Duncan in connection with the above-referenced matter.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

SCHMEISER, OLSEN & WATTS

Autondria S. Minor, Attorney

ASM :dp

Encls.

cc: Client (via email)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Opposer,
v.

Opposition No. 91209747

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Applicant

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Petitioner,
v.

Cancellation No. _____

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Respondent.

NOTICE OF DISCOVERY DEPOSITION

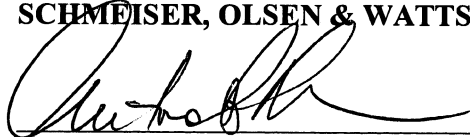
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. (“Applicant”, “Applicant/Petitioner”, “Bluewater Key”) will take the

discovery deposition of Delores Zickert. The deposition will take place on December 11, 2013 at 9:00 am -10:30 am in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 22, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in black ink, appearing to read 'Autondria S. Minor', is written over a horizontal line.

Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

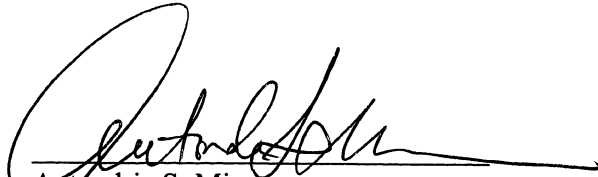
Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

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Antondria S. Minor

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85644802
Published in the Official Gazette on November 13, 2012
Mark: Bluewater Key in International Class: 43

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Opposer,
v.

Opposition No. 91209747

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Applicant

BLUEWATER KEY RV OWNERSHIP
PARK PROPERTY OWNERS
ASSOCIATION, INC.,

Petitioner,
v.

Cancellation No. _____

CLARK, RITA M. d/b/a
BLUEWATER RENTALS

Respondent.

NOTICE OF DISCOVERY DEPOSITION

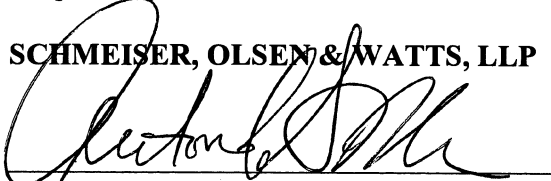
PLEASE TAKE NOTICE that Applicant Bluewater Key RV Ownership Park Property Owners Association, Inc. (“Applicant”, “Applicant/Petitioner”, “Bluewater Key”) will take the

discovery deposition of Catherine Good Duncan. The deposition will take place on December 11, 2013 at 2pm in the offices of Becker & Poliakoff, Emerald Lake Corporate Park, 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525, or at such time and location mutually agreed upon in advance of the appearance date. The deposition will be recorded by stenographic means, will be conducted before an officer authorized to administer oaths and will continue from day to day, weekends and legal holidays excluded, or according to a schedule mutually agreed upon by the parties, until completed.

Dated: November 22, 2013

Respectfully submitted,

SCHMEISER, OLSEN & WATTS, LLP

A handwritten signature in black ink, appearing to read 'Autondria S. Minor', is written over a horizontal line.

Autondria S. Minor

Arlen L. Olsen

Attorneys for Applicant/Petitioner

22 Century Hill, Suite 302

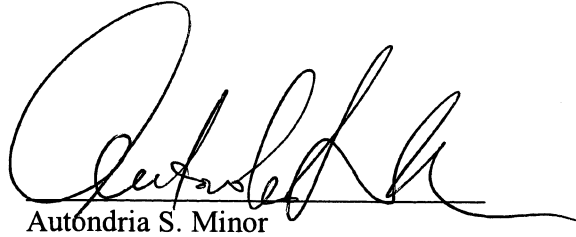
Latham, New York 12110

Telephone: (518) 220-1850

Facsimile: (518) 220-1857

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF DISCOVERY DEPOSITION** was served by electronic mail and/or USPO Express Mail, postage prepaid, on counsel for Opposer/Respondent's counsel, Kevin Markow and Michael De Biase of Becker & Poliakoff, P.A., 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525 on this 22nd day of November 2013.


Autondria S. Minor

**EXHIBIT E OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Monday, November 25, 2013 1:33 PM
To: De Biase, Michael; Markow, Kevin
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

Due to the diverse locations of counsel and witnesses, we believe it would be prudent as well as cost effective for all parties to hold depositions by video teleconference. Please let us know if you consent to video teleconference depositions. Upon your approval and consent, we will send the amended Notices reflecting the update.

The proposed video teleconference depositions would be initiated here in our NY office and conducted through Webex Audio Conference via computer. The minimum technical requirements for a video teleconference are as follows:

- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

December 11, 2013	December 12, 2013	December 13, 2013
Delores Zickert at 9:00 a.m.	Ronald Lacroix at 9:00am-10:30am	Suellen Schwobel at 9:00am-10:30am
Catherine Good Duncan at 2:00 p.m.	Donna Eisentraut at 11:00am - 1:00 pm	Carl Schwobel at 11:00 am-1:00pm
	James Mazurek at 2:30 pm until completion	

****The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.**

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor
Autondria S. Minor
 Schmeiser, Olsen & Watts
 22 Century Hill Drive, Suite 302
 Latham, NY 12110
 Telephone: (518) 220-1850 (Ext. 317)

12/31/2013

Facsimile: (518) 220-1857

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**EXHIBIT F OF
MINOR DECLARATION**

Autondria Minor

From: Markow, Kevin [KMARKOW@bplegal.com]
Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Kindly clear the new proposed dates with our office prior to renoticing. We too have conflicts with the dates and times your office unilaterally scheduled (though we assume you just wanted to get the notices out and would be amenable to scheduling around conflicts). Thx.

Sent from my iPad

Kevin Markow

Attorney at Law
Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](#)
[Website](#)

**BECKER &
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Our clients' total satisfaction is our #1 priority. The Becker & Poliakoff **Client CARE Center** is available for questions, concerns and suggestions. Please contact us at 954.364.6090 or via email at CARE@bplegal.com.

On Nov 25, 2013, at 1:39 PM, "Dianne Pomonis" <dpomonis@iplawusa.com> wrote:

Dear Counsels:

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**The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

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Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

Telephone: (518) 220-1850 (Ext. 317)

Facsimile: (518) 220-1857

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**EXHIBIT G OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Tuesday, November 26, 2013 9:11 AM
To: Markow, Kevin
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. Markow:

Thank you for your email.

Yes, as our notices indicated, we are attempting to find a mutually agreed upon schedule for all parties concerned. To clarify, we chose those dates assuming there would be some conflict on both sides but needed to get the ball rolling due to the tight time restraints.

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Kind regards,

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From: Markow, Kevin [mailto:KMARKOW@bplegal.com]
Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

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MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Wednesday, November 27, 2013 2:29 PM
To: Markow, Kevin; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

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**EXHIBIT I OF
MINOR DECLARATION**

Autondria Minor

From: Dianne Pomonis
Sent: Monday, December 02, 2013 10:14 AM
To: Markow, Kevin; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

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Sent: Monday, December 02, 2013 3:17 PM
To: Dianne Pomonis
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase

Attorney at Law

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Park Place | 311 Park Place Boulevard, Suite 250 | Clearwater, FL 33759
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On Nov 25, 2013, at 1:39 PM, "Dianne Pomonis" <dpomonis@iplawusa.com> wrote:

Dear Counsels:

Due to the diverse locations of counsel and witnesses, we believe it would be prudent as well as cost effective for all parties to hold depositions by video teleconference. Please let us know if you consent to video teleconference depositions. Upon your approval and consent, we will send the amended Notices reflecting the update.

The proposed video teleconference depositions would be initiated here in our NY office and conducted through Webex Audio Conference via computer. The minimum technical requirements for a video teleconference are as follows:

- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

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****The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.**

We certainly want to make depositions convenient for the witnesses and your firm. As this is

a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

Telephone: (518) 220-1850 (Ext. 317)

Facsimile: (518) 220-1857

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**EXHIBIT K OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Monday, December 02, 2013 3:43 PM
To: 'De Biase, Michael'
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

You may contact me today before 4:30pm regarding your dates and times of availability for next week through the close of discovery on December 20, 2013. Otherwise, you may just send us a quick email. Your prompt response is greatly appreciated. Thanks so much.

Sincerely,

Autondria S. Minor
Autondria S. Minor
Schmeiser, Olsen & Watts
22 Century Hill Drive, Suite 302
Latham, NY 12110
Telephone: (518) 220-1850 (Ext. 317)
Facsimile: (518) 220-1857

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From: De Biase, Michael [mailto:MDeBiase@bplegal.com]
Sent: Monday, December 02, 2013 3:17 PM
To: Dianne Pomonis
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase
Attorney at Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525

12/31/2013

Tel: 954.985.4145 | Fax: 954.985.4176 | [E-Mail](#)

Park Place | 311 Park Place Boulevard, Suite 250 | Clearwater, FL 33759

Tel: 727.712.4000 | Fax: 727.796.1484

[Website](#)

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To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

From: Dianne Pomonis [dpomonis@iplawusa.com]

Sent: Monday, December 02, 2013 10:14 AM

To: Markow, Kevin; De Biase, Michael

Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello

Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As you can appreciate, diligent efforts are being made to accommodate all parties concerning the depositions in a timely manner. In order to re-notice the witnesses expeditiously before close of discovery, we will now need to finalize the schedule. Kindly reply with your available dates so that we may coordinate the schedule and re-notice today.

We had previously inquired about depositions by video conference, however, please note, some witnesses must be deposed by **"telephone only"** as their access to the minimal technology requirements for a video conference vary greatly. Kindly advise whether you have any objections to those restrictions. Thank you.

Regards,

Dianne Pomonis

Legal Administrative Assistant to

Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.

SCHMEISER OLSEN & WATTS LLP

22 Century Hill Drive | Suite 302

Latham, New York 12110

Tel: (518) 220-1850 | Fax: (518) 220-1857

Website: <mailto:www.iplawusa.com>

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From: Dianne Pomonis
Sent: Wednesday, November 27, 2013 2:29 PM
To: 'Markow, Kevin'; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As a follow up to our November 25th email, please be advised, we have not received your availability in order for us to coordinate and re-notice the witnesses. Please advise at your earliest convenience.

Should you have any questions, please do not hesitate to contact the office.

Thanking you in advance for your prompt response to this request.

Regards,

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
22 Century Hill Drive | Suite 302
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From: Dianne Pomonis
Sent: Tuesday, November 26, 2013 9:11 AM
To: 'Markow, Kevin'
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. Markow:

12/31/2013

Thank you for your email.

Yes, as our notices indicated, we are attempting to find a mutually agreed upon schedule for all parties concerned. To clarify, we chose those dates assuming there would be some conflict on both sides but needed to get the ball rolling due to the tight time restraints.

As we will need at least a minimum of two days turnaround for deposition transcription, could you kindly provide us with your schedule during the dates of December 3rd through December 17th? We will then attempt to coordinate your schedule with that of the witnesses, clear the available dates with your office and renotice.

Thanking you in advance.

Kind regards,

Dianna

From: Markow, Kevin [mailto:KMARKOW@bplegal.com]
Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Kindly clear the new proposed dates with our office prior to renoticing. We too have conflicts with the dates and times your office unilaterally scheduled (though we assume you just wanted to get the notices out and would be amenable to scheduling around conflicts). Thx.

Sent from my iPad

Kevin Markow

Attorney at Law
Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](mailto:CARE@bplegal.com)
[Website](#)

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12/31/2013

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	James Mazurek at 2:30 pm until completion	

****The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.**

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

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**EXHIBIT L OF
MINOR DECLARATION**

Autondria Minor

From: De Biase, Michael [MDeBiase@bplegal.com]
Sent: Monday, December 02, 2013 5:00 PM
To: Autondria Minor
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Sorry that we were not able to connect. I am working from home and Kevin's call ran a little past schedule. Let's try to connect tomorrow, unless you're available now.

From: Autondria Minor [mailto:aminor@iplawusa.com]
Sent: Monday, December 02, 2013 3:43 PM
To: De Biase, Michael
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

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Sincerely,

Autondria S. Minor
Autondria S. Minor
 Schmeiser, Olsen & Watts
 22 Century Hill Drive, Suite 302
 Latham, NY 12110
 Telephone: (518) 220-1850 (Ext. 317)
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Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

12/31/2013

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase

Attorney at Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4145 | Fax: 954.985.4176 | [E-Mail](#)

Park Place | 311 Park Place Boulevard, Suite 250 | Clearwater, FL 33759
Tel: 727.712.4000 | Fax: 727.796.1484
[Website](#)

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From: Dianne Pomonis [dpomonis@iplawusa.com]

Sent: Monday, December 02, 2013 10:14 AM

To: Markow, Kevin; De Biase, Michael

Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello

Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

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Legal Administrative Assistant to

Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.

SCHMEISER OLSEN & WATTS LLP

12/31/2013

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Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
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Sent from my iPad

Kevin Markow

Attorney at Law
Board Certified in Business Litigation Law

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12/31/2013



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Kind regards,

Autondria S. Minor
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 Schmeiser, Olsen & Watts
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**EXHIBIT M OF
MINOR DECLARATION**

**EXHIBIT O OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Tuesday, December 03, 2013 10:36 AM
To: 'De Biase, Michael'
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

Thank you, we confirm for 11:30 am.

Sincerely,

Autondria S. Minor
Autondria S. Minor
Schmeiser, Olsen & Watts
22 Century Hill Drive, Suite 302
Latham, NY 12110
Telephone: (518) 220-1850 (Ext. 317)
Facsimile: (518) 220-1857

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From: De Biase, Michael [mailto:MDeBiase@bplegal.com]
Sent: Tuesday, December 03, 2013 10:38 AM
To: Autondria Minor
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Great. We'll call you at 11:30.

From: Autondria Minor [mailto:aminor@iplawusa.com]
Sent: Tuesday, December 03, 2013 10:26 AM
To: De Biase, Michael
Cc: Arlen Olsen; Caterina A. Tuminello; Dianne Pomonis
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

We will make ourselves available all day until 3:00pm. Otherwise, you may simply email us

12/31/2013

your dates and times in which you are available. You may also indicate by email any dates you know you will not be available. Since you have been working from home, you certainly may simply email us. We would like to get notices out as soon as possible, but we have no information regarding your availability. We look forward to receiving your call or email regarding your availability for discovery depositions. Thanks so much.

Sincerely,

Autondria S. Minor

Autondria S. Minor

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From: De Biase, Michael [<mailto:MDeBiase@bplegal.com>]

Sent: Tuesday, December 03, 2013 10:20 AM

To: Autondria Minor

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

When are you available today for a short phone call?

From: Autondria Minor [<mailto:aminor@iplawusa.com>]

Sent: Monday, December 02, 2013 3:43 PM

To: De Biase, Michael

Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

You may contact me today before 4:30pm regarding your dates and times of availability for next week through the close of discovery on December 20, 2013. Otherwise, you may just send us a quick email. Your prompt response is greatly appreciated. Thanks so much.

Sincerely,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

12/31/2013

Latham, NY 12110
Telephone: (518) 220-1850 (Ext. 317)
Facsimile: (518) 220-1857

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From: De Biase, Michael [<mailto:MDeBiase@bplegal.com>]
Sent: Monday, December 02, 2013 3:17 PM
To: Dianne Pomonis
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase

Attorney at Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4145 | Fax: 954.985.4176 | [E-Mail](#)

Park Place | 311 Park Place Boulevard, Suite 250 | Clearwater, FL 33759
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From: Dianne Pomonis [dpomonis@iplawusa.com]
Sent: Monday, December 02, 2013 10:14 AM

12/31/2013

To: Markow, Kevin; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

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We had previously inquired about depositions by video conference, however, please note, some witnesses must be deposed by **"telephone only"** as their access to the minimal technology requirements for a video conference vary greatly. Kindly advise whether you have any objections to those restrictions. Thank you.

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From: Dianne Pomonis
Sent: Wednesday, November 27, 2013 2:29 PM
To: 'Markow, Kevin'; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As a follow up to our November 25th email, please be advised, we have not received your availability in order for us to coordinate and re-notice the witnesses. Please advise at your earliest convenience.

Should you have any questions, please do not hesitate to contact the office.

Thanking you in advance for your prompt response to this request.

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Regards,

Dianne Pomonis
Legal Administrative Assistant to
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From: Dianne Pomonis
Sent: Tuesday, November 26, 2013 9:11 AM
To: 'Markow, Kevin'
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. Markow:

Thank you for your email.

Yes, as our notices indicated, we are attempting to find a mutually agreed upon schedule for all parties concerned. To clarify, we chose those dates assuming there would be some conflict on both sides but needed to get the ball rolling due to the tight time restraints.

As we will need at least a minimum of two days turnaround for deposition transcription, could you kindly provide us with your schedule during the dates of December 3rd through December 17th? We will then attempt to coordinate your schedule with that of the witnesses, clear the available dates with your office and renotice.

Thanking you in advance.

Kind regards,

Dianna

From: Markow, Kevin [<mailto:KMARKOW@bplegal.com>]
Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis

12/31/2013

Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello

Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Kindly clear the new proposed dates with our office prior to renoticing. We too have conflicts with the dates and times your office unilaterally scheduled (though we assume you just wanted to get the notices out and would be amenable to scheduling around conflicts). Thx.

Sent from my iPad

Kevin Markow

Attorney at Law

Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525

Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](#)

[Website](#)

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Our clients' total satisfaction is our #1 priority. The Becker & Poliakoff **Client CARE Center** is available for questions, concerns and suggestions. Please contact us at 954.364.6090 or via email at CARE@bplegal.com.

On Nov 25, 2013, at 1:39 PM, "Dianne Pomonis" <dpomonis@iplawusa.com> wrote:

Dear Counsels:

Due to the diverse locations of counsel and witnesses, we believe it would be prudent as well as cost effective for all parties to hold depositions by video teleconference. Please let us know if you consent to video teleconference depositions. Upon your approval and consent, we will send the amended Notices reflecting the update.

The proposed video teleconference depositions would be initiated here in our NY office and conducted through Webex Audio Conference via computer. The minimum technical requirements for a video teleconference are as follows:

- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

December 11, 2013	December 12, 2013	December 13, 2013
Delores Zickert at 9:00 a.m.	Ronald Lacroix at 9:00am-10:30am	Suellen Schwobel at 9:00am-10:30am

12/31/2013

Catherine Good Duncan at 2:00 p.m.	Donna Eisentraut at 11:00am - 1:00 pm	Carl Schwobel at 11:00 am- 1:00pm
	James Mazurek at 2:30 pm until completion	

**The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

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Facsimile: (518) 220-1857

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Autondria Minor

From: De Biase, Michael [MDeBiase@bplegal.com]
Sent: Tuesday, December 03, 2013 10:20 AM
To: Autondria Minor
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

When are you available today for a short phone call?

From: Autondria Minor [mailto:aminor@iplawusa.com]
Sent: Monday, December 02, 2013 3:43 PM
To: De Biase, Michael
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

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Sincerely,

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Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow

12/31/2013

afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase

Attorney at Law

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From: Dianne Pomonis [dpomonis@iplawusa.com]

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Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello

Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As you can appreciate, diligent efforts are being made to accommodate all parties concerning the depositions in a timely manner. In order to re-notice the witnesses expeditiously before close of discovery, we will now need to finalize the schedule. Kindly reply with your available dates so that we may coordinate the schedule and re-notice today.

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Regards,

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Legal Administrative Assistant to

Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.

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Thanking you in advance for your prompt response to this request.

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**EXHIBIT N OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Tuesday, December 03, 2013 10:26 AM
To: 'De Biase, Michael'
Cc: Arlen Olsen; Caterina A. Tuminello; Dianne Pomonis
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

We will make ourselves available all day until 3:00pm. Otherwise, you may simply email us your dates and times in which you are available. You may also indicate by email any dates you know you will not be available. Since you have been working from home, you certainly may simply email us. We would like to get notices out as soon as possible, but we have no information regarding your availability. We look forward to receiving your call or email regarding your availability for discovery depositions. Thanks so much.

Sincerely,

Autondria S. Minor
Autondria S. Minor
 Schmeiser, Olsen & Watts
 22 Century Hill Drive, Suite 302
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Michael N. De Biase

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Attorney at Law
Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](#)
[Website](#)

**BECKER &
POLIAKOFF**



Our clients' total satisfaction is our #1 priority. The Becker & Poliakoff **Client CARE Center** is available for questions, concerns and suggestions. Please contact us at 954.364.6090 or via email at CARE@bplegal.com.

On Nov 25, 2013, at 1:39 PM, "Dianne Pomonis" <dpomonis@iplawusa.com> wrote:

Dear Counsels:

Due to the diverse locations of counsel and witnesses, we believe it would be prudent as well as cost effective for all parties to hold depositions by video teleconference. Please let us know if you consent to video teleconference depositions. Upon your approval and consent, we will send the amended Notices reflecting the update.

12/31/2013

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- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

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Catherine Good Duncan at 2:00 p.m.	Donna Eisentraut at 11:00am - 1:00 pm	Carl Schwobel at 11:00 am-1:00pm
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**The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

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Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

Telephone: (518) 220-1850 (Ext. 317)

Facsimile: (518) 220-1857

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From: Dianne Pomonis
Sent: Tuesday, November 26, 2013 9:11 AM
To: 'Markow, Kevin'
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. Markow:

Thank you for your email.

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Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

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Sent from my iPad

Kevin Markow

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**EXHIBIT O OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Tuesday, December 03, 2013 10:36 AM
To: 'De Biase, Michael'
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

Thank you, we confirm for 11:30 am.

Sincerely,

Autondria S. Minor
Autondria S. Minor
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From: De Biase, Michael [mailto:MDeBiase@bplegal.com]
Sent: Tuesday, December 03, 2013 10:38 AM
To: Autondria Minor
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Great. We'll call you at 11:30.

From: Autondria Minor [mailto:aminor@iplawusa.com]
Sent: Tuesday, December 03, 2013 10:26 AM
To: De Biase, Michael
Cc: Arlen Olsen; Caterina A. Tuminello; Dianne Pomonis
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

We will make ourselves available all day until 3:00pm. Otherwise, you may simply email us

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your dates and times in which you are available. You may also indicate by email any dates you know you will not be available. Since you have been working from home, you certainly may simply email us. We would like to get notices out as soon as possible, but we have no information regarding your availability. We look forward to receiving your call or email regarding your availability for discovery depositions. Thanks so much.

Sincerely,

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From: De Biase, Michael [<mailto:MDeBiase@bplegal.com>]

Sent: Tuesday, December 03, 2013 10:20 AM

To: Autondria Minor

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

When are you available today for a short phone call?

From: Autondria Minor [<mailto:aminor@iplawusa.com>]

Sent: Monday, December 02, 2013 3:43 PM

To: De Biase, Michael

Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

You may contact me today before 4:30pm regarding your dates and times of availability for next week through the close of discovery on December 20, 2013. Otherwise, you may just send us a quick email. Your prompt response is greatly appreciated. Thanks so much.

Sincerely,

Autondria S. Minor

Autondria S. Minor

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Sent: Monday, December 02, 2013 3:17 PM
To: Dianne Pomonis
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

Michael N. De Biase

Attorney at Law

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From: Dianne Pomonis [dpomonis@iplawusa.com]
Sent: Monday, December 02, 2013 10:14 AM

12/31/2013

To: Markow, Kevin; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

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We had previously inquired about depositions by video conference, however, please note, some witnesses must be deposed by **"telephone only"** as their access to the minimal technology requirements for a video conference vary greatly. Kindly advise whether you have any objections to those restrictions. Thank you.

Regards,

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From: Dianne Pomonis
Sent: Wednesday, November 27, 2013 2:29 PM
To: 'Markow, Kevin'; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As a follow up to our November 25th email, please be advised, we have not received your availability in order for us to coordinate and re-notice the witnesses. Please advise at your earliest convenience.

Should you have any questions, please do not hesitate to contact the office.

Thanking you in advance for your prompt response to this request.

12/31/2013

Regards,

Dianne Pomonis
Legal Administrative Assistant to
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Tel: (518) 220-1850 | Fax: (518) 220-1857
Website: <mailto:www.iplawusa.com>

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ATTORNEY-CLIENT, COMMUNITY OF INTEREST PRIVILEGE AND/OR WORK PRODUCT PRIVILEGED COMMUNICATION

12/31/2013

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From: Dianne Pomonis
Sent: Wednesday, November 27, 2013 2:29 PM
To: 'Markow, Kevin'; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As a follow up to our November 25th email, please be advised, we have not received your availability in order for us to coordinate and re-notice the witnesses. Please advise at your earliest convenience.

Should you have any questions, please do not hesitate to contact the office.

Thanking you in advance for your prompt response to this request.

Regards,

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
22 Century Hill Drive | Suite 302
Latham, New York 12110
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From: Dianne Pomonis
Sent: Tuesday, November 26, 2013 9:11 AM
To: 'Markow, Kevin'
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. Markow:

12/31/2013

Thank you for your email.

Yes, as our notices indicated, we are attempting to find a mutually agreed upon schedule for all parties concerned. To clarify, we chose those dates assuming there would be some conflict on both sides but needed to get the ball rolling due to the tight time restraints.

As we will need at least a minimum of two days turnaround for deposition transcription, could you kindly provide us with your schedule during the dates of December 3rd through December 17th? We will then attempt to coordinate your schedule with that of the witnesses, clear the available dates with your office and renotice.

Thanking you in advance.

Kind regards,

Dianna

From: Markow, Kevin [<mailto:KMARKOW@bplegal.com>]
Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Kindly clear the new proposed dates with our office prior to renoticing. We too have conflicts with the dates and times your office unilaterally scheduled (though we assume you just wanted to get the notices out and would be amenable to scheduling around conflicts). Thx.

Sent from my iPad

Kevin Markow

Attorney at Law
Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](mailto:CARE@bplegal.com)
[Website](#)

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Our clients' total satisfaction is our #1 priority. The Becker & Poliakoff **Client CARE Center** is available for questions, concerns and suggestions. Please contact us at 954.364.6090 or via email at CARE@bplegal.com.

On Nov 25, 2013, at 1:39 PM, "Dianne Pomonis" <dpomonis@iplawusa.com> wrote:

Dear Counsels:

12/31/2013

Due to the diverse locations of counsel and witnesses, we believe it would be prudent as well as cost effective for all parties to hold depositions by video teleconference. Please let us know if you consent to video teleconference depositions. Upon your approval and consent, we will send the amended Notices reflecting the update.

The proposed video teleconference depositions would be initiated here in our NY office and conducted through Webex Audio Conference via computer. The minimum technical requirements for a video teleconference are as follows:

- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

December 11, 2013	December 12, 2013	December 13, 2013
Delores Zickert at 9:00 a.m.	Ronald Lacroix at 9:00am-10:30am	Suellen Schwobel at 9:00am-10:30am
Catherine Good Duncan at 2:00 p.m.	Donna Eisentraut at 11:00am - 1:00 pm	Carl Schwobel at 11:00 am-1:00pm
	James Mazurek at 2:30 pm until completion	

**The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

Telephone: (518) 220-1850 (Ext. 317)

Facsimile: (518) 220-1857

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**EXHIBIT Q OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Tuesday, December 03, 2013 12:45 PM
To: 'De Biase, Michael'; 'Markow, Kevin'
Cc: Arlen Olsen; Caterina A. Tuminello; Dianne Pomonis
Subject: FW: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael and Kevin:

You indicated that Rita Clark may want to settle this matter. Today, you indicated that you were having difficulties with the availability of your client and that your firm is now considering sending out discovery deposition notices. You would like a 90 days extension of the discovery period and you would be willing to consent to a motion for extension of the discovery period. You have indicated that it may be impractical to have all the depositions at this point. Until our teleconference today, we were not aware that your firm wanted to conduct discovery depositions in this matter. Since no motion for extension of time is currently before the Trademark Trial and Appeal Board and the Trademark Trial and Appeal Board has not currently approved a motion for extension of the discovery period, we must at least re-notice the depositions to be conducted within the discovery period allowable under the existing second Scheduling Order. Kindly, please send us any dates and times of availability for discovery depositions. We must proceed cautiously in the absence of any current order by the Trademark Trial and Appeal Board approving an extension of the discovery deadlines.

In the meantime, we will follow up with you regarding the points in your teleconference today.

Sincerely,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

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Facsimile: (518) 220-1857

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From: Autondria Minor
Sent: Tuesday, December 03, 2013 10:36 AM
To: 'De Biase, Michael'
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello

12/31/2013

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

Thank you, we confirm for 11:30 am.

Sincerely,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

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From: De Biase, Michael [mailto:MDeBiase@bplegal.com]

Sent: Tuesday, December 03, 2013 10:38 AM

To: Autondria Minor

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Great. We'll call you at 11:30.

From: Autondria Minor [mailto:aminor@iplawusa.com]

Sent: Tuesday, December 03, 2013 10:26 AM

To: De Biase, Michael

Cc: Arlen Olsen; Caterina A. Tuminello; Dianne Pomonis

Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Michael:

We will make ourselves available all day until 3:00pm. Otherwise, you may simply email us your dates and times in which you are available. You may also indicate by email any dates you know you will not be available. Since you have been working from home, you certainly may simply email us. We would like to get notices out as soon as possible, but we have no information regarding your availability. We look forward to receiving your call or email regarding your availability for discovery depositions. Thanks so much.

Sincerely,

Autondria S. Minor

12/31/2013

Autondria S. Minor

Schmeiser, Olsen & Watts
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From: De Biase, Michael [<mailto:MDeBiase@bplegal.com>]
Sent: Tuesday, December 03, 2013 10:20 AM
To: Autondria Minor
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

When are you available today for a short phone call?

From: Autondria Minor [<mailto:aminor@iplawusa.com>]
Sent: Monday, December 02, 2013 3:43 PM
To: De Biase, Michael
Cc: Arlen Olsen; Dianne Pomonis; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Mr. DeBiase:

You may contact me today before 4:30pm regarding your dates and times of availability for next week through the close of discovery on December 20, 2013. Otherwise, you may just send us a quick email. Your prompt response is greatly appreciated. Thanks so much.

Sincerely,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts
22 Century Hill Drive, Suite 302
Latham, NY 12110
Telephone: (518) 220-1850 (Ext. 317)
Facsimile: (518) 220-1857

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From: De Biase, Michael [<mailto:MDeBiase@bplegal.com>]
Sent: Monday, December 02, 2013 3:17 PM
To: Dianne Pomonis
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: RE: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

We would like to schedule a call, preferably this afternoon, after 3 and before 5:30, or late tomorrow afternoon to discuss scheduling issues. Let us know when you are available.

Thank you.

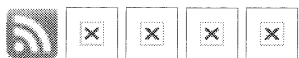
Michael N. De Biase

Attorney at Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525
Tel: 954.985.4145 | Fax: 954.985.4176 | [E-Mail](#)

Park Place | 311 Park Place Boulevard, Suite 250 | Clearwater, FL 33759
Tel: 727.712.4000 | Fax: 727.796.1484
[Website](#)

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From: Dianne Pomonis [dpomonis@iplawusa.com]
Sent: Monday, December 02, 2013 10:14 AM
To: Markow, Kevin; De Biase, Michael
Cc: Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: TIME SENSITIVE REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As you can appreciate, diligent efforts are being made to accommodate all parties concerning the depositions in a timely manner. In order to re-notice the witnesses expeditiously before close of discovery, we will now need to finalize the schedule. Kindly reply with your available dates so that we may coordinate the schedule and re-

12/31/2013

notice today.

We had previously inquired about depositions by video conference, however, please note, some witnesses must be deposed by “**telephone only**” as their access to the minimal technology requirements for a video conference vary greatly. Kindly advise whether you have any objections to those restrictions. Thank you.

Regards,

Dianne Pomonis
Legal Administrative Assistant to
Arlen L. Olsen, Esq. | Autondria S. Minor, Esq.
SCHMEISER OLSEN & WATTS LLP
22 Century Hill Drive | Suite 302
Latham, New York 12110
Tel: (518) 220-1850 | Fax: (518) 220-1857
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Cc: Arlen Olsen; Autondria Minor
Subject: REMINDER-ACTION REQUIRED BLUE.50557-NY | DISCOVERY DEPOSITIONS

Dear Counsels:

As a follow up to our November 25th email, please be advised, we have not received your availability in order for us to coordinate and re-notice the witnesses. Please advise at your earliest convenience.

Should you have any questions, please do not hesitate to contact the office.

Thanking you in advance for your prompt response to this request.

Regards,

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Legal Administrative Assistant to
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Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
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Dear Mr. Markow:

Thank you for your email.

Yes, as our notices indicated, we are attempting to find a mutually agreed upon schedule for all parties concerned. To clarify, we chose those dates assuming there would be some conflict on both sides but needed to get the ball rolling due to the tight time restraints.

As we will need at least a minimum of two days turnaround for deposition transcription, could you kindly provide us with your schedule during the dates of December 3rd through December 17th? We will then attempt to coordinate your schedule with that of the witnesses, clear the available dates with your office and renotice.

Thanking you in advance.

Kind regards,

Dianna

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Sent: Monday, November 25, 2013 10:35 PM
To: Dianne Pomonis
Cc: De Biase, Michael; Arlen Olsen; Autondria Minor; Caterina A. Tuminello
Subject: Re: BLUE.50557-NY | DISCOVERY DEPOSITIONS

Kindly clear the new proposed dates with our office prior to renoticing. We too have conflicts with the dates and times your office unilaterally scheduled (though we assume you just wanted to get the notices out and would be amenable to scheduling around conflicts). Thx.

Sent from my iPad

12/31/2013

Kevin Markow

Attorney at Law

Board Certified in Business Litigation Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525

Tel: 954.985.4174 | Fax: 954.985.4176 | [E-Mail](#)[Website](#)**BECKER &
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Dear Counsels:

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The proposed video teleconference depositions would be initiated here in our NY office and conducted through Webex Audio Conference via computer. The minimum technical requirements for a video teleconference are as follows:

- (a) Internet Access;
- (b) Webcam;
- (c) Computer headset with microphone
- (d) As a backup audio source, a telephone to dial into an "800 number" teleconference

Please note these notices are still subject to confirmation by our witnesses shortly. To date, the deposition schedule is as follows:

December 11, 2013	December 12, 2013	December 13, 2013
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Catherine Good Duncan at 2:00 p.m.	Donna Eisentraut at 11:00am - 1:00 pm	Carl Schwobel at 11:00 am-1:00pm
	James Mazurek at 2:30 pm until completion	

****The date and time for attorney Richard Nageotte's deposition will likely have to be revised due to his professional commitments.**

We certainly want to make depositions convenient for the witnesses and your firm. As this is a shortened work week, we look forward to hearing from you shortly.

Kind regards,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

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**EXHIBIT R OF
MINOR DECLARATION**

Autondria Minor

From: Autondria Minor
Sent: Monday, December 09, 2013 8:47 AM
To: 'Markow, Kevin'; 'De Biase, Michael'
Cc: Arlen Olsen; Dianne Pomonis
Subject: BLUE.50057

Dear Kevin and Michael:

Applicant consents to your request for a 90 days extension of the discovery period.

Sincerely,

Autondria S. Minor

Autondria S. Minor

Schmeiser, Olsen & Watts

22 Century Hill Drive, Suite 302

Latham, NY 12110

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**EXHIBIT S OF
MINOR DECLARATION**

Autondria Minor

From: De Biase, Michael [MDeBiase@bplegal.com]

Sent: Monday, December 09, 2013 10:07 AM

To: Autondria Minor; Markow, Kevin

Cc: Arlen Olsen; Dianne Pomonis

Subject: RE: BLUE.50057

Would you like us to file the agreed request, or will your office handle it?

Michael N. De Biase

Attorney at Law

Emerald Lake Corporate Park | 3111 Stirling Road | Fort Lauderdale, FL 33312-6525

Tel: 954.985.4145 | Fax: 954.985.4176 | [E-Mail](#)

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Our clients' total satisfaction is our #1 priority. The Becker & Poliakoff **Client CARE Center** is available for questions, concerns and suggestions. Please contact us at 954.364.6090 or via email at CARE@bplegal.com.

From: Autondria Minor [mailto:aminor@iplawusa.com]

Sent: Monday, December 09, 2013 8:47 AM

To: Markow, Kevin; De Biase, Michael

Cc: Arlen Olsen; Dianne Pomonis

Subject: BLUE.50057

Dear Kevin and Michael:

Applicant consents to your request for a 90 days extension of the discovery period.

Sincerely,

Autondria S. Minor

12/31/2013

Antondria S. Minor

Schmeiser, Olsen & Watts

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**EXHIBIT T OF
MINOR DECLARATION**

272 F.R.D. 385, 79 Fed.R.Serv.3d 272
(Cite as: 272 F.R.D. 385)

C

United States District Court,
S.D. New York.
ESTATE OF Vasilij Gerasimenko and Larisa
Gerasimenko, Plaintiffs,
v.
CAPE WIND TRADING COMPANY, et al., Defen-
dants.

No. 09 Civ. 8067 (BSJ)(JLC).
March 17, 2011.

Background: Seaman's estate and seaman's widow brought admiralty action for wrongful death against vessel owners and vessel manager. Estate and widow moved for order providing that deposition of widow and certain designated witnesses of defendants, all of whom were Latvian residents, be taken by telephone or other remote means.

Holding: The District Court, James L. Cott, United States Magistrate Judge, held that widow's deposition would be taken by telephone in first instance.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others
Pending Action
170AX(C)3 Examination in General
170Ak1383 k. Time and place of ex-
amination. Most Cited Cases

As a general rule, a plaintiff, having selected the forum in which the suit is brought, will be required to make himself or herself available for deposition examination there. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1383

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There is no absolute rule as to the location of the deposition of a nonresident plaintiff, as courts must strive to achieve a balance between claims of prejudice and those of hardship. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure
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Ultimately, the determination of the location of a deposition of a nonresident plaintiff rests in the discretion of the court and there must be a careful weighing of the relevant facts. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

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[4] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

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170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

Telephone depositions create issues that in-person depositions do not, and yet telephone depositions are a presumptively valid means of discovery. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

Deposition of seaman's widow, who was resident of Latvia, would be taken by telephone in first instance, in her admiralty action for wrongful death against vessel owners and vessel manager, even though she had recently been provided with \$89,100 to settle her claim for contractual death benefits, where she had been designated as low income person by social services agency in Latvia, and owners and manager did not contend that case would turn on widow's testimony and did not identify specific prejudice they would face if they were not allowed to observe her during deposition. Fed.Rules Civ.Proc.Rule 30(b)(4), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

The usual rule in federal litigation is that in the absence of special circumstances, a party seeking discovery must go where the desired witnesses are normally located, and this rule applies with equal force to witnesses designated by a corporation that has received a notice of deposition. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

Any presumption regarding the location of a deposition of a witness designated by a corporation that has received a notice of deposition is merely a decision rule that facilitates determination when other relevant factors, for example, cost, convenience, and litigation efficiency, do not favor one side over the other. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

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Authorization to take a deposition by telephone does not require an applicant to show hardship. Fed.Rules Civ.Proc.Rule 30(b)(4), 28 U.S.C.A.

***386** George Michael Chalos, Kerri Marie D'Ambrosio, Chalos & Co., P.C., Oyster Bay, NY, for Plaintiffs.

Patrick F. Lennon, Lennon, Murphy, Caulfield & Phillips, LLC, New York, NY, for Defendants.

MEMORANDUM AND ORDER

JAMES L. COTT, United States Magistrate Judge.

The Estate of Vasilij Gerasimenko and Larisa Gerasimenko (together "Plaintiffs") move pursuant to Rule 30(b)(4) of the Federal Rules of Civil Procedure for an Order providing that the depositions of Ms. Gerasimenko, a Latvian resident, and certain designated witnesses of Defendants Cape Wind Trading Co. ("Cape Wind"), LSC Shipmanagement Ltd. ("LSC"), and Latvian Shipping Co. ("Latvian Shipping"), all of whom reside in Latvia, be taken by telephone or other remote means. For the reasons set forth below, Plaintiffs' motion is granted.

I. BACKGROUND

This admiralty action for wrongful death arises out of the death of Vasilij Gerasimenko on August 27, 2008 aboard the M/T INDRA, a vessel owned by Defendants Cape Wind and Latvian Shipping and managed by Defendant LSC. Complaint dated Sept. 21, 2009 ("Compl.") ¶¶ 8–20 (Dkt. No. 1). Ms. Gerasimenko, the decedent's wife, seeks to recover sums allegedly due to her as the nominated beneficiary under her husband's employment contract, along with future wages that would have been due to him, loss of benefits, pain and suffering, and loss of companionship. Compl. ¶¶ 22–28.

Ms. Gerasimenko was unemployed at the time of her husband's death, and her husband was her sole

financial provider. Declaration of Larisa Gerasimenko dated March 8, 2011 ("Gerasimenko Decl.") ¶ 4. Ms. Gerasimenko, who alleges that her health has deteriorated since her husband's death, remains unemployed today and has been "unable to find a job because of the ongoing economic crisis in Latvia." *Id.* ¶ 5. Because of Ms. Gerasimenko's lack of financial resources, on January 1, 2010, Riga Social Services determined her to have "family (person) in need status" from that date until March 31, 2010. *Id.* ¶ 6 & Ex. 2. This status apparently entitles Ms. Gerasimenko to certain welfare benefits. *Id.* Ex. 2. Although Ms. Gerasimenko recently received a death benefit settlement of \$89,100 from Defendants, Declaration of Roman Rozhkov dated March 11, 2011 ("Rozhkov Decl.") ¶ 5, she apparently continues to hold this status today. Gerasimenko Decl. ¶ 8 & Ex. 3.

On or about December 9, 2010, Plaintiffs noticed the depositions of Defendants' designated officers, directors, or managing agents pursuant to Fed.R.Civ.P. 30(b)(6) to take place in New York. Plaintiffs' Letter to the Hon. James L. Cott dated March 9, 2011 ("Pls.' Letter") at 2. Shortly thereafter, Defendants noticed the deposition of Ms. Gerasimenko to take place in New York. *Id.* The parties have failed to come to an agreement on how these depositions should proceed. By Order dated December 30, 2010, non-expert discovery is to be completed by March 31, 2011. (Dkt. No. 19).

Although Ms. Gerasimenko states that she will be able to afford to travel to the United States when and if this action proceeds to trial, she states further that does not have the financial resources to travel to the United States for her deposition or to finance her attorneys' travel to Latvia for her deposition or the deposition of Defendants' witnesses. Gerasimenko Decl. ¶¶ 11–12.

II. REQUEST FOR REMOTE DEPOSITIONS

Plaintiffs contend, among other things, that re-

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mote depositions are necessary because Ms. Gerasimenko is indigent and will suffer financial hardship if her deposition and those of Defendants' witnesses proceed in person in Latvia. Pls.' Letter at 2–3. Defendants take issue with the characterization of Ms. Gerasimenko as indigent and maintain that Ms. Gerasimenko has failed to make a sufficient showing of indigence or that she will suffer hardship if Defendants depose her in New York. Defendant's Letter to the Hon. James L. Cott received March 14, 2011 (“Defs.’ Letter”) at 1. Defendants contend, *387 among other things, that Ms. Gerasimenko can finance her travel to New York using a portion of the \$89,100.00 that Defendants recently provided to her as a death benefit settlement. *Id.* at 4. Defendants also argue that a telephonic deposition of Ms. Gerasimenko will prejudice them because it will not allow them to observe her nonverbal responses and demeanor or to use and examine documents effectively.^{FN1}

FN1. Defendants do not respond to Plaintiffs’ request to depose Defendants’ 30(b)(6) witnesses by telephone in their submission.

A. Legal Standard

Rule 30(b)(4) of the Federal Rules of Civil Procedure provides, in relevant part, that “[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.”^{FN2} Rule 30(b)(4) does not specify the standard for evaluating motions to have a deposition conducted telephonically or remotely, and courts in this Circuit generally apply different standards depending on whether the party seeking the deposition or the deponent—as an alternative to traveling to the district in which the action was filed—requests that the deposition occur remotely. *See Memory Film Prods. v. Makara*, No. 05 Civ. 3735(BMC)(KAM), 2007 WL 1385740, at *2 (E.D.N.Y. May 9, 2007) (discussing this distinction) (citations omitted); *Moore’s Federal Practice* § 30.24[1] at 30–60 (same). Plaintiffs’ motion implicates both circum-

stances.

FN2. This provision formerly appeared in Fed.R.Civ.P. 30(b)(7). *See, e.g.*, 7A James W. Moore, *et al.*, *Moore’s Federal Practice* ¶ 30.24[1] at 30–58 (3d ed. 2008).

B. Deposition of Ms. Gerasimenko—Request by Deponent

[1] Defendants correctly note that, as a general rule, a plaintiff, having selected the forum in which the suit is brought, will be required to make himself or herself available for examination there. *See, e.g.*, *Schindler Elevator Corp. v. Otis Elevator Co.*, No. 06 Civ. 5377(CM)(THK), 2007 WL 1771509, at *8 (S.D.N.Y. June 18, 2007) (collecting cases); *Dubai Islamic Bank v. Citibank, N.A.*, No. 99 Civ.1930(RMB)(TH), 2002 WL 1159699, at *12 (S.D.N.Y. May 21, 2002) (collecting cases).

[2][3] There is, however, “no absolute rule as to the location of the deposition of a nonresident plaintiff” as “courts must strive to achieve a balance between claims of prejudice and those of hardship.” *Normande v. Grippo*, No. 01 Civ. 7441(JSR)(THK), 2002 WL 59427, at *1–2 (S.D.N.Y. Jan. 16, 2002) (citations omitted). Ultimately, the determination of “‘[t]he matter rests in the discretion of the court and there must be a careful weighing of the relevant facts.’” *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591, 592 (S.D.N.Y.1994) (quoting *Seuthe v. Renwal Prods., Inc.*, 38 F.R.D. 323, 324 (S.D.N.Y.1965)).

Accordingly, decisions in this District sometimes order that depositions of plaintiffs be held elsewhere or by telephone where the plaintiff is physically or financially unable to come to the forum. *See, e.g.*, *Zito v. Leasecomm Corp.*, 233 F.R.D. 395, 398 (S.D.N.Y.2006) (allowing certain plaintiffs’ depositions to proceed by telephone where monetary value of claims were low and travel to distant cities would

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be a hardship for them but allowing defendants to conduct examinations by video-conference provided that they bear the expense and make arrangements for plaintiffs to appear within 50 miles of plaintiffs' residences); *Normande*, 2002 WL 59427, at *1–2 (application to take deposition by telephone granted where plaintiff resided in Brazil, would have to travel with small infant, and case was not complex); *Abdullah*, 154 F.R.D. at 592–94 (where indigent plaintiff lived in London and would face prejudice with respect to an asylum application in the United Kingdom if he left the country, defendants were required to travel to London to take plaintiff's deposition; parties were to bear their own costs for the travel to London but if defendants prevailed at trial, plaintiff was to bear costs and travel expenses of one of defendants' attorneys).

1. Hardship to Ms. Gerasimenko

Defendants rely on *Clem v. Allied Lines International Corp.*, 102 F.R.D. 938 (S.D.N.Y.1984), and *388 *Daly v. Delta Airlines, Inc.*, No. 90 Civ. 5700(MEL), 1991 WL 33392 (S.D.N.Y. Mar. 1, 1991), in support of their contentions that Ms. Gerasimenko must demonstrate “extreme hardship” to warrant relief from the general rule and that she has failed to meet that burden here. Defs.' Letter at 3. The facts of each of these cases, however, are distinguishable from those presented here.

In *Clem*, the court denied plaintiff, an employee of Merrill Lynch stationed in Hong Kong, permission to have his deposition taken by telephone, holding that “absent extreme hardship, the plaintiff should appear for deposition in his chosen forum.” *Clem*, 102 F.R.D. at 940. The plaintiff argued that he could not afford to travel to New York and provided the court with an affidavit that stated that he was “not a wealthy man” and that “this is not a ‘big case.’ ” *Id.* The court found this argument unavailing, reasoning that the plaintiff had not sufficiently detailed his financial position to allow the court to assess whether the plaintiff's travel to New York was indeed cost

prohibitive. *Id.* The court also reasoned that, because the plaintiff's testimony would resolve several issues in the case, “the defendant [was] entitled to depose the plaintiff face-to-face in order to adequately prepare for trial.” *Id.* Although the court did order the deposition of plaintiff to proceed in person, in order to minimize the burden on him, it also provided that the deposition take place during a time period, shortly before trial, when he planned to be in the United States. *Id.*

Similarly, in *Daly*, the court denied the request of plaintiff, an anesthesiologist practicing in Ireland, for a protective order that his depositions take place either on written questions or by telephone. *Daly*, 1991 WL 33392, at *1. The plaintiff there did not argue that he would suffer hardship by traveling to New York for a deposition; instead, he merely stated that “his absence would be an inconvenience to his colleagues and to the surgical patients in need of his services.” *Id.* at *2. Rejecting this contention, the court noted that it “hardly constitutes a showing of inordinate hardship, economic or otherwise” and reasoned that the cost of a flight from Dublin to New York was not “unlikely to be unduly expensive for one in plaintiff's profession and medical specialty,....” *Id.* Moreover, the court noted that it appeared that the plaintiff would likely be required as part of pre-trial discovery to travel to New York for a physical examination anyway. *Id.* Thus, in order to minimize the inconvenience on, and expense to, plaintiff, the court ordered his deposition and physical examination to take place on the same day. *Id.*

Here, unlike the plaintiffs in *Clem* and *Daly*, Ms. Gerasimenko is not a well-compensated physician or an employee at an international investment bank; she has been unemployed since her husband's death in August 2008 and remains unemployed today. *Gerasimenko Deck* ¶¶ 4–5. Moreover, unlike the plaintiffs in those cases, she has provided the Court with a sworn declaration and exhibits that adequately establishes her tenuous financial position and the burden

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that travel to New York for the deposition would impose on her: Riga Social Services has designated her as a low income person in need since January 2010. *Id.* ¶¶ 6–8 & Exs. 1–3.^{FN3} A person is able to attain this status “if the income per each family member during the last three months does not exceed 90 LVL (about 180 USD)....” Rozhkov Decl. ¶ 6, While it may be true, as Defendants contend, that the \$89,100.00 Defendants recently provided to Ms. Gerasimenko to settle her claim for contractual death benefits may no longer render her a person in need under the applicable Latvian regulations, it can hardly be said with certainty that Ms. Gerasimenko's financial situation, even when that sum is taken into account, is a stable one. Indeed, a round trip flight to New York and the cost of *389 lodging for even a short period of time could cost Ms. Gerasimenko several thousand dollars, not an insignificant portion of the death benefit funds. I conclude that having to expend these funds to travel to New York to be deposed constitutes a hardship for Ms. Gerasimenko. I now weigh this hardship against the prejudice that ordering a remote deposition would have on Defendants.

FN3. The same cannot be said of Ms. Gerasimenko's assertion that her “health has deteriorated following [her] husband's death,....” Gerasimenko Decl. ¶ 5. While understandably she has suffered as a result of her husband's death, Ms. Gerasimenko has not provided the Court with any information regarding her health, and accordingly this assertion provides insufficient support for Ms. Gerasimenko's position that her deposition should occur remotely. *See, e.g., Price v. Priority Transp.*, No. 07 Civ. 6627(CJS), 2008 WL 4515093, at *1 (W.D.N.Y. Oct. 1, 2008) (plaintiff's request that her deposition be conducted in Georgia denied where plaintiff made conclusory statement the lawsuit was negatively affecting her health).

2. Prejudice to Defendants

[4] Defendants contend that they “will be greatly prejudiced by a telephonic deposition” because such a deposition will force them either to travel to Latvia at their expense to take the deposition in person, or “sacrifice counsel's ability to observe and interact with the deponent, to the detriment of their case.” Defs.' Letter at 3. These are valid concerns. Telephone depositions create issues that in-person depositions do not, and yet “telephone depositions are a ‘presumptively valid means of discovery.’ ” *Robert Smalls Inc. v. Hamilton*, No. 09 Civ. 7171(DAB)(JLC), 2010 WL 2541177, at *1 (S.D.N.Y. June 10, 2010) (quoting *Zito*, 233 F.R.D. at 398). Moreover, although some courts have concluded that the inability to observe a person's demeanor may justify a denial of a Rule 30(b)(4) motion, *see, e.g., Sampathachar v. Fed. Kemper Life Assurance Co.*, No. Civ. A. 03–5905, 2004 WL 2743589, at *2 (E.D.Pa. Nov. 24, 2004) (denying Rule 30(b)(4) motion of plaintiff, a resident of India, for remote deposition because the case was “likely to turn on the testimony by and credibility of” plaintiff); *Anguile v. Gerhart*, Civ. A. No. 93–934(HLS), 1993 WL 414665, at *3 (D.N.J. Oct. 7, 1993) (granting motion of plaintiff, a key witness, for initial telephonic deposition, provided that second deposition would be in person), these concerns are not at issue in every case. *See, e.g., Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444, 446–47 (W.D.Mich.1993) (because deponent officers of corporate plaintiff not suspected to be untrustworthy, telephonic deposition would not prejudice defendant).

Here, Defendants do not contend that the case will turn on Ms. Gerasimenko's testimony and do not identify the specific prejudice they will face if they are not allowed to observe her during the deposition. Although Defendants do not mention the subject matter of the testimony they hope to elicit from Ms. Gerasimenko in their submission to the Court, during the Court's telephonic conference with the parties on March 4, 2011, Defendants stated that Ms. Gera-

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simenko's testimony would largely relate to damages. While this is obviously an important issue, it is not one upon which the case will turn in the first instance.

Defendants also contend that a telephonic deposition, coupled with the use of a translator, will hinder their ability to question Ms. Gerasimenko regarding a "host of document [sic] to be identified," Defs.' Letter at 4. Defendants do not contend, however, that the documents are voluminous and central to the deposition of Gerasimenko, a contention that might provide a basis for precluding a remote deposition. *Cf. Fireman's Fund Ins. Co. v. Zoufaly*, No. 93 Civ. 1890(SWK), 1994 WL 583173, at *1 (S.D.N.Y. Oct. 21, 1994) (application by plaintiff to depose witness telephonically granted where defendant argued prejudice on ground that defendant may wish to show the witness some documents in cross-examining him) (citing *Mercado v. Transoceanic Cable Ship Co.*, Civ. A. No. 88-5335, 1989 WL 83596, at *1 (E.D.Pa.1989)).

[5] Balancing the hardship on Ms. Gerasimenko against the prejudice to Defendants, I conclude that Defendants' deposition of Ms. Gerasimenko should proceed by telephone in the first instance.^{FN4} In order to address Defendants' concerns regarding their use of documents during Ms. Gerasimenko's deposition, Defendants are encouraged to produce to Plaintiffs' counsel all documents that they intend to use prior to the deposition to ensure timely translation.

FN4. To the extent Defendants consider it essential to view Ms. Gerasimenko's demeanor during the deposition and do not wish to incur the expense of travelling to Latvia, Defendants may make arrangements to conduct the examination by video-conference or other remote means rather than by telephone provided that they bear the expense. *See Zito*, 233 F.R.D. at 398 (same result).

The Court will entertain an application from Defendants to require Ms. Gerasimenko *390 to appear in New York for a follow-up deposition, but only if Defendants can demonstrate that they were for some reason unable to conduct a meaningful deposition by telephone (or video-conference). *See Robert Smalls, Inc.*, 2010 WL 2541177, at *4 (citations omitted).^{FN5}

FN5. Such an application would require Defendants to produce a copy of the deposition transcript, and identify with specificity (by page and line references, as appropriate), the purported inadequacies of the deposition.

The Court now turns to Plaintiffs' request to depose Defendants' designated 30(b)(6) witnesses by telephone.

C. Depositions of Defendants' 30(b)(6) Witnesses—Request by Party Seeking Deposition

[6] Rule 30(b)(6) of the Federal Rules of Civil Procedure provides, in relevant part, that when a corporation receives a notice for a deposition, it "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf." "The usual rule ... in federal litigation, is that in the absence of special circumstances, a party seeking discovery must go where the desired witnesses are normally located." *In re Fosamax Prods. Liab. Litig.*, No. 1:06-MD-1789 (JFK)(JCF), 2009 WL 539858, at *1 (S.D.N.Y. Mar. 4, 2009) (citations, internal quotations, and alterations omitted). This rule applies with equal force to 30(b)(6) witnesses. *See Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, No. 96 Civ. 3231(RPP), 2003 WL 23009989, at *1 (S.D.N.Y. Dec. 23, 2003) ("There is a presumption that depositions of corporate officers will take place at the corporate officer's residence or the corporation's principal place of business.") (citing *Buzzeo v. Bd. of Educ., Hempstead*, 178 F.R.D. 390, 392 (E.D.N.Y.1998)). Its rationale is that "plaintiff usu-

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ally may choose the forum for a lawsuit, but a defendant may not.” *Robert Smalls Inc.*, 2010 WL 2541177, at *1 (citing *Dagen v. CFC Grp. Holdings Ltd.*, No. 00 Civ. 54682(CBM), 2003 WL 21910861, at *2 (S.D.N.Y. Aug. 11, 2003)).

[7] However, any presumption is “merely a decision rule that facilitates determination” when other relevant factors—for example, cost, convenience, and litigation efficiency—do not favor one side over the other. *Robert Smalls Inc.*, 2010 WL 2541177, at *1 (citing *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y.1989)); see also *In re Fosamax*, 2009 WL 539858, at *1; *Dagen*, 2003 WL 21910861, at *3 (quoting *In re Livent, Inc. Sec. Litig.*, No. 98 Civ. 5686(VM), 2002 WL 31366416, at *1 (S.D.N.Y. Oct. 21, 2002)). Indeed, one commentator notes that this presumption is more honored in the breach than the observance. 2 Michael C. Silberberg, *Civil Practice in the Southern District of New York* § 17.12 at 17–39 (2d ed. 2000) (citing cases). In any event, the presumption need not come into play here.

[8] Where, as here, a party seeking the deposition wishes to take the deposition by telephone pursuant to Fed.R.Civ.P. 30(b)(4), courts in this Circuit have noted “that permission to take a deposition by telephone ‘should be granted unless an objecting party will likely be prejudiced or the method employed would not reasonably ensure accuracy and trustworthiness.’ ” *Memory Film Prods.*, 2007 WL 1385740, at *2 (denying request by deponents to take deposition by phone where defendant wished to take deponents’ depositions in Serbia where they resided and was willing to bear the cost of travel there) (quoting *Fireman’s Fund Ins. Co.*, 1994 WL 583173, at *1); see also *Advani Enters., Inc. v. Underwriters at Lloyds*, 95 Civ. 4864(CSH), 2000 WL 1568255, at *3 (S.D.N.Y. Oct. 19, 2000) (telephone depositions of two “crucial” non-party witnesses residing in Egypt permitted where defendants failed to demonstrate prejudice). Moreover, authorization of such a deposition under these circumstances does not require an

applicant to show hardship. See *Advani*, 2000 WL 1568255, at *2 (citation omitted); *Fireman’s Fund*, 1994 WL 583173, at *1.

Defendants do not address Plaintiffs’ motion to depose Defendants’ designated witnesses by telephone in their submission to the Court. Therefore, there is nothing before the Court that suggests that this method *391 of deposition will prejudice them or not reasonably ensure accuracy and trustworthiness. Accordingly, Plaintiffs’ motion to depose Defendants’ designated 30(b)(6) witnesses by telephone is granted. See, e.g., *Advani*, 2000 WL 1568255, at *2–3; *Fireman’s Fund*, 1994 WL 583173, at *1.

III. CONCLUSION

For the foregoing reasons, Defendants’ deposition of Ms. Gerasimenko and Plaintiffs’ deposition of Defendants’ designated 30(b)(6) witnesses shall proceed by telephone or other remote means. All such depositions shall comport with Rule 28(b) of the Federal Rules of Civil Procedure.

The Clerk of the Court is directed to docket Plaintiffs’ letter to the Court dated March 9, 2011 (and the accompanying Declaration of Larisa Gerasimenko) and Defendants’ letter to the Court received March 14, 2011 (and the accompanying Declaration of Roman Rozhkov).

SO ORDERED.

S.D.N.Y., 2011.

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**EXHIBIT U OF
MINOR DECLARATION**

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H

United States District Court,
S.D. New York.
Thomas ZITO, et al., Plaintiff,

v.

LEASECOMM CORPORATION, Microfinancial
Incorporated, Cardservice International, Inc., E-
Commerce Exchange, Inc., On-Line Exchange, Rich-
ard Karn Wilson a/k/a Richard Karn, Patrick Rettew,
Peter R. Von Bleyleben, Richard F. Latour, Carol
Salvo, Paul Schneider, Metrak Corporation, Charles
Burtzloff a/k/a Chuck Burtzloff, John Doe and Eddy
Roe, the last two being fictitious names, the real
names of said Defendants being presently unknown
to Plaintiffs, said fictitious names being intended to
designate persons who are acting in concert with the
Defendants, Defendants.

No. 02 Civ. 8074 GEL/JCF.
Feb. 10, 2006.

Background: Plaintiffs brought civil racketeering
action to recover for fraudulent scheme involving the
leasing of e-commerce services and products. They
moved for protective order in response to discovery
request.

Holdings: The District Court, Francis, United States
Magistrate Judge, held that:

- (1) plaintiffs were not entitled to substitute deposition
upon written questions for oral depositions;
- (2) plaintiffs without claims for intentional infliction
of emotional distress (IIED) were entitled to appear
for deposition by telephone or videoconference;
- (3) plaintiffs with IIED claims were required to ap-
pear in New York for their depositions; and
- (4) defendants' interrogatories were abusive.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 1369.1

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Plaintiffs were not entitled to substitute deposi-
tion upon written questions for oral depositions
sought by defendants in civil racketeering action to
recover for fraudulent scheme involving the leasing
of e-commerce services and products; the plaintiffs
proffered no persuasive reason to disregard the pre-
sumption in favor of oral depositions.

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Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and Place of Examination. Most Cited Cases

Plaintiffs without claims for intentional infliction of emotional distress (IIED) were entitled to appear for deposition by telephone or videoconference within fifty miles of home in civil racketeering action to recover for fraudulent scheme involving the leasing of e-commerce services and products; it would be a hardship for many plaintiffs to travel to distant cities to be deposed on claims that in some instances had very modest monetary value, the defendants would also save expenses by taking these depositions telephonically, but if the defendants desired to view the demeanor of a plaintiff, they could pay and make arrangements for video deposition.

[3] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In General. Most Cited Cases

Telephone depositions are a presumptively valid means of discovery.

[4] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In General. Most Cited Cases

Authorization to take telephonic depositions does not depend upon a showing of hardship by the applicant.

[5] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and Place of Examination. Most Cited Cases

Plaintiffs with claims for intentional infliction of emotional distress (IIED) were required to appear in New York for their depositions in civil racketeering action to recover for fraudulent scheme involving the leasing of e-commerce services and products; their claims could dwarf the claims of other plaintiffs and would be required to appear in New York for medical examinations in any event.

[6] Federal Civil Procedure 170A 1501

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1501 k. In General. Most Cited Cases

Defendants' single set of interrogatories consisting of 169 separate questions was abusive in civil racketeering action to recover for fraudulent scheme involving the leasing of e-commerce services and products; the defendants demanded that each plaintiff identify witnesses and documents relevant to each separate subpart, and since the plaintiffs disclosed the names of potential witnesses and were in the process of producing relevant documents, requiring them to respond individually to the highly detailed interroga-

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tories would provide little additional benefit, but would be extremely expensive and time-consuming. Fed.Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1261

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1261 k. In General. Most Cited Cases

Plaintiffs in civil racketeering action to recover for fraudulent scheme involving the leasing of e-commerce services and products could not limit defendants' discovery to proceeding first with some twenty bellwether cases and then continuing, one after another, with plaintiffs who sought only to have their credit rating cleared, who sought monetary damages in the nature of restitution, who sought compensatory damages, and who alleged intentional infliction of emotional distress (IIED); plaintiffs advanced no basis for the selection of the specific bellwether cases, did not articulate what issues might be decided preclusively on the basis of the bellwether cases, and failed to explain how proceeding in stages would produce efficiencies rather than delay.

*396 MEMORANDUM AND ORDER

FRANCIS, United States Magistrate Judge.

This is a civil RICO action brought by more than 200 individual plaintiffs who allege that they suffered injury as the result of a fraudulent scheme involving the leasing of e-commerce services and products. In the broadest terms, the plaintiffs assert that defendant Leasecomm Corporation "formed an *397 enterprise with various dealers who used unscrupulous and deceptive marketing tactics to lure unsuspecting victims into signing contracts with Leasecomm. These contracts contained unconscionable terms that allowed members of the enterprise to 'reap unconscionable profits' through extreme collection tactics." *Zito v.*

Leasecomm Corp., No. 02 Civ. 8074, 2004 WL 2211650, at *1 (Sept. 30, 2004) ("*Leasecomm II*").^{FN1}

FN1. A full summary of the plaintiffs' factual allegations is found in *Leasecomm II* as well as in *Zito v. Leasecomm Corp.*, No. 02 Civ. 8074, 2003 WL 22251352 (Sept. 30, 2003) ("*Leasecomm I*").

The plaintiffs have filed what they characterize as an "omnibus" motion for a protective order, seeking relief with respect to several aspects of discovery. First, they ask that certain of the plaintiffs be permitted to respond to written questions in lieu of appearing in person for deposition, or, in the alternative, that these plaintiffs be deposed by telephone or videoconference. Other plaintiffs seek to be relieved of the obligation of appearing in New York for deposition. Second, the plaintiffs request that they not be required to provide individualized responses to the defendants' interrogatories. And, finally, the plaintiffs propose that a bellwether structure be imposed on this litigation such that only certain representative cases proceed initially through discovery and trial.

I will address each application in turn.

Depositions

Throughout the discovery planning process, the parties have distinguished between plaintiffs who assert claims of intentional infliction of emotional distress (the "IIED plaintiffs") and those who do not (the "non-IIED plaintiffs"). For example, in a prior conference before the Honorable Gerald E. Lynch, U.S.D.J., counsel discussed the possibility of deposing the IIED plaintiffs in New York and the non-IIED plaintiffs in several locations throughout the country. The Court issued no ruling at that time with respect to the location or format of any deposition. However, in a case management plan dated January 13, 2005, Judge Lynch directed that IIED plaintiffs appear for

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depositions and independent medical examinations in New York; again, he withheld ruling with respect to non-IIED plaintiffs. (Civil Case Management Plan (the “CMP”), attached as Exh. C to Affidavit of María D. Meléndez dated Sept. 29, 2005 (“Meléndez Aff.”), ¶ 6(c)(vi)).

The defendants then served notices of deposition for all plaintiffs, designating New York as the location for the IIED plaintiffs and one of seven different cities as the location for each non-IIED plaintiff.^{FN2} (Meléndez Aff., Exh. I). The plaintiffs objected to the notices, and all discovery disputes were referred to me for resolution. In the meantime, the parties embarked on settlement negotiations, and discovery was held in abeyance. No agreement was reached, however, and the deposition issues are now ripe for determination.

FN2. The cities designated for non-IIED plaintiffs were San Francisco, Denver, Chicago, Dallas, Orlando, Atlanta, and New York.

[1] The proposal that the non-IIED plaintiffs be subject to deposition upon written questions is without merit. Written questions are rarely an adequate substitute for oral depositions both because it is difficult to pose follow-up questions and because the involvement of counsel in the drafting process prevents the spontaneity of direct interrogation. Accordingly, depositions upon written questions are disfavored. See *Horvath v. Deutsche Lufthansa, AG*, No. 02 Civ. 3269, 2004 WL 241671, at *3-4 (S.D.N.Y. Feb. 9, 2004); *Sadowski v. Technical Career Institutes, Inc.*, No. 93 Civ. 455, 1994 WL 240546, at *1 (S.D.N.Y. May 27, 1994); *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549 (S.D.N.Y.1989). Here, the plaintiffs have proffered no persuasive reason why the presumption in favor of oral depositions should be disregarded. Indeed, their complaint that it is unduly burdensome for them to provide individual answers to the defendants' interrogatories seems inconsistent

with their purported preference for depositions upon written questions. Accordingly, all plaintiffs shall appear for oral deposition.

[2][3][4] The argument that the non-IIED plaintiffs should be permitted to appear for *398 deposition by telephone or videoconference is more persuasive. Telephone depositions are a “presumptively valid means of discovery.” *Normande v. Grippo*, No. 01 Civ. 7441, 2002 WL 59427, at *2 (S.D.N.Y. Jan. 16, 2002). Moreover, “[a]uthorization to take telephonic depositions does not depend upon a showing of hardship by the applicant.” *Advani Enterprises, Inc. v. Underwriters at Lloyds*, No. 95 Civ. 4864, 2000 WL 1568255, at *2 (S.D.N.Y. Oct. 19, 2000). Indeed, in this case, it would be a hardship for many of the non-IIED plaintiffs to travel to distant cities to be deposed on claims that in some instances have very modest monetary value. By contrast, there is little prejudice to the defendants, who would also save expenses by taking these depositions telephonically. The depositions of the non-IIED plaintiffs shall therefore be conducted by telephone. However, to the extent that the defendants consider it important to view the demeanor of such a plaintiff during a deposition, the defendants may conduct the examination by videoconference provided that they bear the expense and make arrangements for the plaintiff to appear within 50 miles of the plaintiff's residence. I reserve the right to order a follow-up in-person deposition in any instance where the defendants can demonstrate that they were unable to conduct a meaningful deposition by telephone or videoconference. See *Normande*, 2002 WL 59427, at *2.

[5] Eight IIED plaintiffs have applied to be relieved of the obligation of appearing in New York for their depositions.^{FN3} (Declaration of John C. Klotz dated Aug. 30, 2005 (“Klotz Decl.”), Exhs. E, F, G, H, I, J, K, L). Their requests are based primarily on issues of health and lack of financial resources. However, they have offered no persuasive reason for me to reconsider Judge Lynch's prior order directing that

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all IIED plaintiffs be deposed in New York. These plaintiffs have claims that could potentially dwarf the claims of the non-IIED plaintiffs, and they would be required to appear in New York for medical examinations in any event. And, while the costs of travel may not be insignificant, plaintiffs' counsel are permitted to advance the expenses of litigation to their clients, provided the plaintiffs remain ultimately liable for such costs. New York Code of Professional Responsibility DR 5-103. The application of the IIED plaintiffs is therefore denied. The defendants shall, however, coordinate the depositions of these plaintiffs with the independent medical examinations so that the plaintiffs need travel to New York only once prior to trial.

FN3. These plaintiffs are Kevin Pirnie, Eugene Sokol, Tammy Sokol, Mary Scott, David Scott, Patrick Curran, Cynthia Haase (a/k/a Cynthia Gunderson), and Christopher Nguti Ndakwe.

Interrogatories

[6] The defendants served a single set of interrogatories consisting of 169 separate questions. (Defendants' (Other Than Richard Karn Wilson a/k/a Richard Karn and Patrick Rettew) First "Master" Set of Interrogatories to Plaintiff Thomas Zito and Each of the Plaintiffs Whose Name and Address Appear on Schedule One to the Second Amended Complaint, attached as Exh. L to Meléndez Aff.). The plaintiffs responded with a single set of answers, objecting to certain interrogatories, providing some answers, and directing the defendants to information provided in the plaintiffs' initial disclosure pursuant to Rule 26(a)(1). (Plaintiffs' Response to Defendants' First Set of Interrogatories, attached as Exh. M to Meléndez Aff.). The defendants then complained that the responses were inadequate because, among other things, they failed to provide the requested information with respect to each individual plaintiff. The defendants later expressed a willingness to accept general answers to certain interrogatories so long as

the answers were submitted-and verified or sworn to by every plaintiff, and so long as each plaintiff provided specific answers to interrogatories having to do with individualized issues.^{FN4} (Meléndez Aff., Exh. N). The plaintiffs would not agree, and they note that if each individual plaintiff's response were equal in length to the collective response already submitted, a total of more than 13,000*399 pages would be generated. (Klotz Decl., ¶ 41).

FN4. The defendants identified Interrogatories Nos. 1, 3-13, 23-47, 49-51, 53-65, 67-69, 71-95, 106-113, and 118-120 as requiring individualized specific responses.

At the outset, I am doubtful that the defendants' discovery demand complies with the limitation on the number of interrogatories imposed by the Federal Rules. Pursuant to Rule 33(a), absent stipulation or permission of the court, "any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts[.]" One court has read the term "parties" literally, finding that three defendants were each entitled to serve 25 interrogatories on the plaintiff, for a total of 75 questions. *See St. Paul Fire and Marine Insurance Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 217 F.R.D. 288, 289 (D.Mass.2003). On this reading of the rule, the defendants' interrogatories were proper, since eleven defendants joined in their submission. By the same reasoning, the plaintiffs would be entitled to propound more than 5,000 interrogatories.

A more sensible approach is advocated in one of the leading civil procedure treatises:

The limitation on number of depositions ... speaks in terms of "sides" rather than parties. Because it frequently happens that a number of parties on the same side are represented by a single attorney and in that sense act in unison, this concept might be attractive in the interrogatory setting as well. In in-

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stances of legally related parties such as a parent corporation and its subsidiary, this could be particularly attractive. But the basic problem is more widespread. Consider, for example, a situation in which ten people injured in a bus crash sue the bus company in a single suit represented by the same lawyer. Should they be considered one party or ten for purposes of the interrogatory limitation? The best result would seem to be to recognize that in some instances nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation.

Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2168.1 at 261 (2d ed.1994).

I need not decide, however, whether the plain language of Rule 33(a) must be strictly applied in all circumstances. In this case, even if the interrogatories do not exceed the number permitted by rule, they are abusive. The defendants have, in essence, divided the issues in this case into numerous subparts and then demanded that each plaintiff identify witnesses and documents relevant to each separate subpart. Under Rule 26(b)(2), “[t]he frequency or extent of use of the discovery methods otherwise permitted ... shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative ... or (iii) the burden or expense of the proposed discovery outweighs its likely benefit[.]” Here the plaintiffs have disclosed the names of potential witnesses and are in the process of producing relevant documents. Requiring them to respond individually to the highly detailed interrogatories would provide little additional benefit but would be extremely expensive and time-consuming.

The defendants are, however, entitled to know when the plaintiffs have produced all documents responsive to their requests, and I will establish a date for the plaintiffs to represent that their production is complete. Further, to the extent that the defendants

become aware during deposition that any plaintiff possesses relevant documents that were not previously disclosed, that plaintiff will appear for continued deposition after the additional documents are produced.

Case Management

[7] Finally, the plaintiffs propose proceeding first with some twenty bellwether cases and then continuing, one after another, with the following categories of plaintiffs: those who seek only to have their credit rating cleared, those who seek monetary damages in the nature of restitution, those who seek compensatory damages, and those who assert IIED claims. (Klotz Decl., ¶¶ 78, 95-102). This proposal is largely incoherent. The plaintiffs have advanced no basis for the selection of the specific bellwether cases; they have not articulated what issues might be decided preclusively on the basis of the bellwether cases; and they have not explained how proceeding in stages will produce efficiencies rather than delay. I will not, therefore, structure discovery along the *400 lines suggested by the plaintiffs. Whether there is some rational basis for deciding how to group the cases for trial is a matter best deferred until the close of discovery.

In light of the rulings here and the delay occasioned by the unsuccessful settlement negotiations, the case management plan is modified as follows:

1. By February 28, 2006, the plaintiffs shall produce all documents required to be disclosed pursuant to Rule 26(a)(1) or responsive to any outstanding discovery requests and shall certify the completeness of the production.

2. By March 3, 2006, counsel shall agree on a schedule for depositions of all parties, failing which they shall present any disputes to the Court for resolution.

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3. All fact discovery shall be completed by June 30, 2006.

4. The plaintiffs shall submit any expert reports and related expert disclosure by July 31, 2006, and the depositions of the plaintiffs' experts shall be completed by August 31, 2006.

5. The defendants shall submit any expert reports and related expert disclosure by September 29, 2006, and the depositions of the defendants' experts shall be completed by October 31, 2006.

6. The pretrial order shall be submitted by November 30, 2006, unless any dispositive motion is filed by that date. If such a motion is filed, the pretrial order shall be due thirty days after the motion is decided.

Conclusion

For the reasons discussed, the plaintiffs' motion for a protective order is granted to the extent that depositions of the non-IIED plaintiffs shall be conducted telephonically or by videoconference, and the plaintiffs need not respond further to the defendants' interrogatories. However, all IIED plaintiffs shall appear for deposition in New York, and the Court will not designate bellwether cases or structure discovery in stages. The case management order is amended as set forth above.

SO ORDERED.

S.D.N.Y., 2006.

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END OF DOCUMENT

**EXHIBIT V OF
MINOR DECLARATION**

123 F.R.D. 175

(Cite as: 123 F.R.D. 175)

H

United States District Court,
E.D. Pennsylvania.

Julia M. BYWATERS

v.

Lloyd K. BYWATERS.

Civ. A. No. 86-6973.
Nov. 28, 1988.

Plaintiff moved to have expert witness more than 500 miles away deposed over telephone, and to have telephonic deposition videotaped. The District Court, Gawthrop, III, J., held that witness could be deposed by telephone and "handed" documents by counsel via "fax" machine, but deposition would not be videotaped in light of concern that jury would see, and counsel would miss, facial expressions of witness that might otherwise lead to follow-up questioning.

Motion granted in part and denied in part.

West Headnotes

Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In General. Most Cited Cases

Expert witness more than 500 miles away could be deposed by telephone and "handed" documents

from counsel via "fax" machine, but deposition would not be videotaped in light of concern that jury would see, but counsel would miss, facial expressions of witness that might otherwise lead to follow-up questioning. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

*176 Esther L. Hornik, Bala Cynwyd, Pa., for plaintiff.

Lloyd Keith Bywaters, Phillipsburg, N.J., in pro per.

Bruce A. Thomas, George A. Heitzman, Bethlehem, Pa., for defendants.

MEMORANDUM

GAWTHROP, III, District Judge.

Before me is a motion to have plaintiff's expert witness, her treating psychiatrist, Thomas E. Lauer, M.D., deposed over the telephone. The doctor's office is located in North Carolina, over five hundred miles from this courthouse, and counsel asks that there be a video camera running, photographing the doctor in North Carolina while he is being queried by lawyers at the Pennsylvania end of long-distance telephone lines. The reason for the request is that the doctor is deemed an essential witness, and both the plaintiff and the defendant are sufficiently penurious that plaintiff would not only have difficulty mustering the \$10,000.00 which Dr. Lauer charges for out-of-state testimony, so also would the transportation costs for all lawyers to go to North Carolina be prohibitive.

Defense counsel has no objection to the telephonic deposition, but does argue that for a witness to be videotaped at the other end of the line, while blind to him, would put him in the difficult position of perhaps missing a facial expression, which, were he in the room watching the witness, would cause

123 F.R.D. 175

(Cite as: 123 F.R.D. 175)

him to follow up with additional questioning, so that the video picture the jury would see could be explained by further examination. So also, defense counsel objects on the ground that he may wish to hand certain documents to the witness during the course of the deposition, as part of his cross-examination, and argues that his client's due process rights would be unacceptably attenuated were he deprived of the ability to do that.

Seeking to resolve this practical dilemma in a manner least intrusive upon the parties' respective purses, yet as consistent as possible with due process and in getting the whole of the evidence before the jury which will shortly hear this cause, I think it appropriate, in order to allay defendant's valid visual-demeanor concerns, that the deposition proceed, but without videotape. Rather, it will simply take place over the telephone, with stenographic transcript being made at either end of the line, with a court reporter who can hear all the speakers, either in person or over the wire. As for the request, which I deem legitimate, for counsel to have the ability to hand a witness documents, defense counsel has a suggestion which I think neatly solves the problem with the wonders of modern technology. The deposition of the physician shall take place on a telephone in a room which also has or is immediately adjacent to a facsimile or so-called "fax" machine, and counsel will be in a room, or in separate rooms in a conference call, which, or each of which, shall also have a facsimile machine immediately available. Thus, should counsel wish to in effect hand a piece of paper to the witness, they may do so simply by sending an electronic facsimile which shall arrive in the hand of the witness being deposed very shortly after being put on the machine. This seems reasonably consistent with due process, as well as with Federal Rule of Civil Procedure 30(b)(7)), which allows depositions to be taken by telephone upon stipulation of counsel, or court order. See also: *Jahr v. IU International Corporation*, 109 F.R.D. 429 (M.D.N.C.1986). As Judge Newcomer noted in *Davis v. Sedco Forex*, Civ.A. No. 86-2311

(E.D.Pa.1986) [1986 WL 13301], "[t]he Rules of Civil Procedure favor the use of our technological benefits in order to promote flexibility, simplify the pretrial and trial procedure and reduce expenses to parties."*177 In *Moncrief v. Fecken-Kipfel America, Inc.*, No. 88-4930, slip op. at 5 (E.D.Pa. June 22, 1988) [1988 WL 68088], I observed that "[c]ourts should welcome new technologies helpful in presenting a clear picture of the truth." This case is one more step in that worthy direction.

An appropriate order follows.

ORDER

AND NOW, this 23rd day of November, 1989, it is directed that a telephonic, aural, deposition of Thomas E. Lauer, M.D., augmented by the presence of facsimile or "fax" machines, as more fully described in the accompanying memorandum, shall be permitted to take place.

E.D.Pa.,1988.

Bywaters v. Bywaters

123 F.R.D. 175

END OF DOCUMENT

**EXHIBIT W OF
MINOR DECLARATION**

145 F.R.D. 444, 25 Fed.R.Serv.3d 484
(Cite as: 145 F.R.D. 444)

▷

United States District Court,
W.D. Michigan.

REHAU, INC., a Delaware corporation, Plaintiff and
Counter-Defendant,

v.

COLORTECH, INC., a Michigan corporation;
Paulette Leist, a Michigan resident; Dawn Johns, a
Michigan resident; and Hans Lill, a West Virginia
resident, Defendants and Counter-Claimants.

No. 5:90:CV:57.
Jan. 7, 1993.

Corporation that was plaintiff in civil action appealed from order of United States Magistrate Judge Rowland granting defendants' motion to compel depositions of several parties. The District Court, Enslen, J., held that: (1) corporation's former employee could be compelled to submit to deposition without subpoena, as officer, director, or managing agent; (2) Rules of Civil Procedure do not require that telephonic deposition may only be taken upon showing of necessity, financial inability, or other hardship; and (3) telephonic deposition of two corporate officers who resided in Europe would be allowed.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A 🔑 1353.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)2 Proceedings

170Ak1353 Subpoena

170Ak1353.1 k. In general. Most

Cited Cases

(Formerly 170Ak1353)

Defendant in action brought by corporation was entitled to compel deposition of corporation's former employee without subpoena; former employee was now director of purchasing for corporation's parent company, his father was president of both corporation and parent, and former employee was member of corporation's management committee, so that he could be considered officer, director, or managing agent of corporation.

[2] Federal Civil Procedure 170A 🔑 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited

Cases

Telephonic deposition of two of plaintiff's corporate officers who resided in Europe would be allowed; defendants did not show that use of telephonic depositions would be inaccurate or untrustworthy, or that defendants would be prejudiced in any way. Fed.Rules Civ.Proc.Rules 26(b)(1), (c), 30(b)(7), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 🔑 1381

170A Federal Civil Procedure
170AX Depositions and Discovery

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170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

Rules of Civil Procedure do not require that telephonic deposition may only be taken upon showing of necessity, financial inability, or other hardship. Fed.Rules Civ.Proc.Rules 26(b)(1), (c), 30(b)(7), 28 U.S.C.A.

***444** Webb A. Smith, Scott A. Storey, Foster, Swift, Collins & Smith, PC, Lansing, MI, Randall S. Schau, Scott Graham, Gemrich, Moser, Bowser, Fette & Lohrmann, Kalamazoo, MI, for plaintiff.

***445** Alan H. Silverman, Barbara H. Donnelly, James Robard, Alan H. Silverman, P.C., Kalamazoo, MI, for defendants.

OPINION

ENSLEN, District Judge.

This discovery dispute is before the Court pursuant to plaintiff's appeal of a portion of an Order issued by Magistrate Judge Rowland. On November 16, 1992, Magistrate Judge Rowland issued an Opinion and Order granting defendants' motion to compel the depositions of several parties. Plaintiff now objects to the order as applied to Helmut and Jobst Wagner, who are citizens of Germany and Sweden.

[1] Defendants' motion to compel depositions was part of its ongoing efforts to discover plaintiff's corporate meeting minutes.^{FN1} In its motion, defendants argued that had plaintiff properly responded to prior discovery requests, depositions taken earlier could have covered issues raised by the notes. Magistrate Judge Rowland agreed that the notes were responsive to plaintiff's February 19, 1991 discovery requests, and that plaintiff's failure to produce the notes at that time prevented defendants from inquir-

ing about them in depositions of Rehau employees taken in November and December, 1991. Therefore, Magistrate Judge Rowland concluded, plaintiff should bear the expense of providing for the attendance of Helmut and Jobst Wagner at depositions in Kalamazoo, Michigan. In addition, Magistrate Judge Rowland concluded that because they are officers subject to control of the plaintiff corporation, this Court has the authority to compel the deposition of Helmut and Jobst Wagner, and subpoenas need not be issued. *See*, 8 Wright & Miller, *Federal Practice and Procedure*, § 2107 (1970).

FN1. Magistrate Judge Rowland reviewed the Corporate Meeting Minutes, concluded that they were not protected by the attorney/client privilege as plaintiff asserted, and ordered plaintiff to produce them for defendants.

Plaintiff objects to Magistrate Rowland's grant of an order to compel the deposition of the Wagners, and in the alternative, argues that the Wagners should not be required to travel to Michigan, and instead should be deposed telephonically.

Should the Court Compel the Depositions of the Wagners?

A judge may reconsider any pretrial matter a magistrate judge rules on when the magistrate's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). I do not find that Magistrate Judge Rowland's order compelling the deposition of the Wagners meets this standard of error. I agree that defendants were placed at an unfair disadvantage when they were required to take the depositions of Rehau personnel without being afforded the opportunity to review the minutes of corporate meetings.

Plaintiff first argues that the Court cannot compel the deposition of Jobst Wagner because he is no longer employed by plaintiff. Jobst Wagner left the

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employ of Rehau in October of 1990. However, he is currently the Director of Purchasing for plaintiff Rehau's European based parent company. Jobst's father, Helmut, is President of plaintiff Rehau and its European parent company as well. In addition, he was a member of plaintiff Rehau's Management Committee while he was located in the United States. Upon review, I believe that Magistrate Judge Rowland's conclusion that Jobst Wagner may be considered an officer, director, or managing agent of plaintiff, and therefore his deposition may be compelled without subpoena, is not clearly erroneous or contrary to law.

Secondly, plaintiff claims that the order to compel the deposition of Helmut Wagner was in error because he did not attend the Management Committee Meetings. The Order states that the scope of the depositions "shall be limited to inquires regarding each deponents involvement in Plaintiff's corporate meetings which were conducted from January, 1989 through January 1992." Therefore, plaintiff argues, he will have nothing to contribute to defendants' inquiry. Defendants argue that Helmut Wagner was copied with each minute in *446 question, and that some meeting minutes include references to him. Defendants have a right to inquire about Helmut Wagner's "involvement in Plaintiff's corporate meetings", and it is conceivable that such involvement need not include presence at the meetings. Therefore, I will deny plaintiff's appeal on this point as well.

Should the Wagners be Deposed by Telephone?

[2] Magistrate Judge Rowland's Order requires that Jobst and Helmut Wagner be brought from Europe to Kalamazoo, Michigan at plaintiff's expense, so that defendants may ask them about their involvement in approximately three years of Management Committee Meetings. Plaintiff requests that this Court modify the Order so that the Wagners may be deposed by telephone pursuant to Fed.R.Civ.P. 30(b)(7), 26(b) and 26(c). Rule 30(b)(7) provides that the court may, upon motion, order that a deposition be taken by telephone. In relevant part, Rule 26 pro-

vides as follows:

[(b)(1)] the frequency or extent of use of the discovery methods ... shall be limited by the court if it determines that ... the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

* * * * *

[(c)] the court ... may make any order which justice requires to protect a party or person from ... undue burden or expense, including one or more of the following: ... (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

Few courts have addressed the correct application of Rule 30(b)(7). The test advanced by one district court is that when a "real potential for prejudice can be shown ... the court must balance the likelihood, nature and extent of such prejudice against the issues involved in the litigation and the inconvenience and cost of using alternative, more traditional methods of discovery." *Mercado v. Transoceanic Cable Ship Co., Inc.*, 1989 WL 83596, U.S.Dist. LEXIS 8484 (E.D.Penn.1989) (denying motion to take depositions by telephone because discussion of diagrams and photographs were an integral part of the inquiry). In a slightly different context, the D.C. Circuit Court of Appeals has concluded that the only reason to deny a party's motion under Rule 30(b)(4) to take deposition by other than stenographic means is if the requested method would not reasonably ensure accuracy and trustworthiness equivalent to stenography, or if the opposing party's interests will be prejudiced. *Colonial Times v. Gasch*, 509 F.2d 517

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(Cite as: 145 F.R.D. 444)

(D.C.Cir.1975).

[3] I disagree with the approach of the district court for the Southern District of New York, which concluded that absent extreme hardship, the plaintiff should be required to appear for deposition in his or her chosen forum. *Clem v. Allied Van Lines Int'l Corp.*, 102 F.R.D. 938 (S.D.N.Y.1984). Instead, I think that the rationale of *Jahr v. IU Int'l Corp.*, 109 F.R.D. 429 (M.D.N.C.1986) is correct:

Nothing in the language of Rule 30(b)(7) requires that a telephonic deposition may only be taken upon a showing of necessity, financial inability, or other hardship.... by looking to a concomitant 1980 amendment to Rule 30, one discerns a purpose to encourage the courts to be more amenable to employing non-traditional methods for conducting depositions ... in order to reduce the cost of federal litigation.

* * * * *

Because of the history and similar purpose of subsections (b)(4) and (b)(7), the Court concludes that leave to take telephonic depositions should be liberally granted in appropriate cases.... Thus, upon giving a legitimate reason for taking a deposition telephonically, the movant need not further show an extraordinary need for the deposition. Rather, the burden is on the opposing party to *447 establish why the deposition should not be conducted telephonically.

109 F.R.D. 429, 430–31. The *Jahr* court's interpretation of Rule 30(b)(7) is consistent with Rule 1, which states that the Rules of Civil Procedure shall be “construed to secure the just, speedy, and inexpensive determination of every action.” Fed.R.Civ.P. 1.

Defendants make no claim that the use of telephonic depositions in this case will be inaccurate or

untrustworthy, and they do not argue that they will be prejudiced in any way. Defendants only state that they anticipate that each deposition will last one full day at the least.

There is no reason why a full day's deposition cannot be conducted by a conference call, and there is no indication that the integrity of the discovery process will be compromised in any way by doing so. The litigants in this action have managed to file 367 documents with this Court to date—surely, the expenses to each side must be astronomical. I see positively no reason to add the cost of two trans-Atlantic flights and hotel accommodations to the tab when the same task can be accomplished with two simple phone calls. Therefore, plaintiff's motion on this point will be granted.

W.D.Mich.,1993.

Rehau, Inc. v. Colortech, Inc.

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**EXHIBIT X OF
MINOR DECLARATION**

Not Reported in F.Supp.2d, 2011 WL 5597124 (N.D.Cal.)
(Cite as: 2011 WL 5597124 (N.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Francisco Division.
Gary GEE, Roxanne Mazarakis, Jody Soto, Plaintiffs,
v.
SUNTRUST MORTGAGE, INC., Defendant.

No. 10-cv-01509 RS (NC).
Nov. 15, 2011.

Matthew C. Helland, Nichols Kaster, LLP, San Francisco, CA, Justin Swartz, Rachel M. Bien, Outten & Golden LLP, New York, NY, for Plaintiffs.

Martha S. Doty, Alston & Bird LLP, Los Angeles, CA, Glenn Garrison Patton, Robert Steve Ensor, Alston & Bird LLP, Atlanta, GA, for Defendant.

ORDER DENYING MOTION TO COMPEL
NATHANAEL M. COUSINS, United States Magistrate Judge.

*1 Suntrust moves to compel the three named plaintiffs and twenty-five opt-in plaintiffs who live in twenty-five different cities across the country to appear for depositions in San Francisco or in three other cities of its choice. ^{FN1} Suntrust argues that the deponents are required to appear in San Francisco, which is where this Fair Labor Standards Act ("FLSA") putative class action was filed, because they have not established good cause for appearing elsewhere. As a compromise, Suntrust offers to take the depositions either in San Francisco or in three other cities it claims would be more convenient to the deponents. Plaintiffs oppose the motion, arguing that traveling to any of the cities selected by Suntrust would be financially burdensome for them, and that requiring them to do so despite this burden would contradict the pur-

pose of joining a collective action brought under the FLSA. Based on the papers submitted by the parties, the Court finds that the motion is appropriate for determination without oral argument. *See* Civil L.R. 7-1(b). Because the financial concerns expressed by Plaintiffs constitute good cause for excusing the deponents from traveling to the cities selected by Suntrust for the depositions, Suntrust's motion is denied.

FN1. The three named plaintiffs are Gary Gee, Roxanne Mazarakis, and Jodi Soto. The twenty-five Opt-In plaintiffs are Marilyn Keith, Ellen Hancock, Emily Braun, BeLinda Goble, Carol Johnson, Bruce Cohen, Kimberly Keppley, Pamela Rodriguez, Carole Sienko, Diane Daniel, Karla Reich, Ronald Woods, Elizabeth Gonzalez-Kosel, Miriam McCallister, Brenda Tanner, Jane Thomas, Marilou Pearson, Michele Belk, Leslie Rose-Ryan, Kimberly Webster, Brenda Bruton-Bowman, Wendy Corbin, Michelle Littell, Kelly Dorr, and Julie Lanham. Ensor Decl., Ex. B.

I. BACKGROUND

Plaintiffs allege that Suntrust failed to pay them overtime wages in violation of the FLSA, the California Labor Code, and California's Unfair Competition Law. Dkt. No. 19. On February 18, 2011, the District Court granted Plaintiffs' motion for conditional class certification for the purpose of providing notice to potential opt-in class members. Dkt. No. 54. A total of 117 current and former Suntrust employees opted into the collective action.

On August 19, 2011, Suntrust noticed the depositions of three named plaintiffs and twenty-five opt-in plaintiffs for the week of October 3, 2011 in San Francisco, California. Ensor Decl., Ex. B. Suntrust claims to have chosen San Francisco as the location

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of the depositions because that is where the action was filed. Dkt. No. 115 at 2. When Plaintiffs' counsel objected to the location of the depositions as inconvenient to the proposed deponents, as they live in twenty-five different cities, Suntrust offered to take the depositions in four cities: San Francisco, California; Orlando, Florida; Charlotte, North Carolina; and Richmond, Virginia. *Id.* at 3; Ensor Decl, Ex. C. Plaintiffs rejected the offer and stated that if Suntrust could not conduct the depositions in the fourteen cities they consider to be the most convenient to the deponents, then it must conduct them via teleconference. Ensor Decl, Ex. C. Because the parties were unable to reach an agreement as to the location of the depositions, Suntrust filed this motion.

II. STANDARD OF REVIEW

The location of a deposition is initially selected by the party noticing the deposition. Fed.R.Civ.P. 30(b)(1). In the event of a dispute between the parties as to the location of a deposition, the court may prescribe the time, place, and terms of the deposition "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c)(1).

III. DISCUSSION

*2 Suntrust moves to compel three named plaintiffs and twenty-five opt-in plaintiffs to appear for depositions in San Francisco, which is the forum where the action was filed. Dkt. No. 115. Alternatively, Suntrust requests that each deposition take place in one of the following four cities: San Francisco, California; Orlando, Florida; Charlotte, North Carolina; and Richmond, Virginia. *Id.* at 7. Suntrust opposes conducting the depositions via telephone or videoconference, as doing so would deprive it of "its right to cross-examine the Plaintiffs face-to-face" and to "observe their demeanors." *Id.* at 3.

Suntrust argues that the named Plaintiffs in any action are required to appear for depositions in the forum in which the suit was filed unless they show

good cause for appearing elsewhere. *Id.* at 4–5. Suntrust further argues that opt-in plaintiffs in FLSA collective actions also are required to appear for depositions in the forum where the action was filed because they were aware of that location when they voluntarily joined the suit, and that the purpose of FLSA collective actions does not excuse deponents from this obligation. *Id.* at 5–6; Dkt. No. 124 at 3.

Plaintiffs oppose the motion, arguing that requiring the deponents to travel to the cities selected by Suntrust for their depositions would be unduly burdensome and expensive for them, which contradicts the purpose of joining a collective action brought under the FLSA. Dkt. No. 121 at 1. Plaintiffs note that because the purpose of collective actions under the FLSA is to lower the costs for each plaintiff, several courts around the country have ruled that opt-in plaintiffs in FLSA collective actions are not required to appear for depositions in the forum where the action was filed when doing so would be financially burdensome for them. Dkt. No. 121 at 5–7. Plaintiffs therefore request that the depositions take place in fourteen cities of their choice, which they argue are more convenient to the deponents.^{FN2} *Id.* at 3.

FN2. The cities are Phoenix, Arizona; Folsom, California; San Diego, California; San Francisco, California; Daytona Beach, Florida; Orlando, Florida; Tampa, Florida; Charlotte, North Carolina; Raleigh, North Carolina; Nashville, Tennessee; Austin, Texas; Dallas, Texas; Alexandria, Virginia; and Richmond, Virginia. Helland Decl., Ex. 6.

Suntrust responds that the authority cited by Plaintiffs is distinguishable from this case and is therefore inapposite. Dkt. No. 124 at 3–5. It argues that when courts have excused plaintiffs in FLSA collective actions from appearing for depositions in the forum where the action was filed, they did so because one of the parties refused to compromise or the issues to be covered in the depositions were simple

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and did not require conducting the depositions in person, which is not the case here. Dkt. No. 124 at 4–5.

The Court agrees with Plaintiffs. One of the chief advantages of opting into a collective action, such as the one brought by Plaintiffs, is that it “lower[s] individual costs to vindicate rights by the pooling of resources.” *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 179, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). Here, this advantage would be significantly reduced or even eliminated if the proposed deponents are required to travel hundreds of miles for their depositions. *See, e.g., Bransfield v. Source Broadband Services, LLC*, 255 F.R.D. 447, 450 (W.D.Tenn.2008) (rejecting defendants’ argument that opt-in plaintiffs in FLSA collective action must be required to appear for depositions in the forum where action was filed because doing so “would cancel much of the benefit gained by joining in the collective action” and because “the forum was chosen for [the opt-in plaintiffs]”). The Court is not persuaded by Suntrust’s interpretation of the case law cited by Plaintiffs, but even when taking its interpretation at face value, this case meets the criteria for excusing the deponents from appearing in the cities selected by Suntrust, as Suntrust has made no showing that the issues to be covered in the depositions are sufficiently complex to require in-person depositions.

*3 Likewise, Suntrust’s argument that conducting the depositions via videoconference would be detrimental to its ability to question and observe the deponents is unconvincing. Parties routinely conduct depositions via videoconference, and courts encourage the same, because doing so minimizes travel costs and “permits the jury to make credibility evaluations not available when a transcript is read by another.” *Fanelli v. Centenary College*, 211 F.R.D. 268, 270 (D.N.J.2002) (citations omitted); *see also Guillen v. Bank of America Corp.*, No. 10–cv–05825, 2011 WL 3939690, at *1 (N.D.Cal. August 31, 2011) (“A desire to save money constitutes good cause to

depose out-of-state witnesses via telephone or remote means”). Accordingly, Suntrust’s motion is denied.

IV. CONCLUSION

Suntrust’s motion to compel three named plaintiffs and twenty-five opt-in plaintiffs to appear for depositions in San Francisco or in three other cities of its choice is DENIED. Suntrust may conduct in-person depositions of the named plaintiffs and opt-in plaintiffs in the fourteen cities proposed by Plaintiffs, or it may conduct the depositions via videoconference, at a date and time that is convenient to both parties.

IT IS SO ORDERED.

N.D.Cal.,2011.

Gee v. Suntrust Mortg., Inc.

Not Reported in F.Supp.2d, 2011 WL 5597124
 (N.D.Cal.)

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**EXHIBIT Y OF
MINOR DECLARATION**

109 F.R.D. 429, 4 Fed.R.Serv.3d 943
(Cite as: 109 F.R.D. 429)

▷

United States District Court,
M.D. North Carolina

Greensboro Division.

Constance Ann JAHR, Plaintiff,
v.

IU INTERNATIONAL CORPORATION and CCX
Nationwide, Inc., jointly and severally, doing busi-
ness as Coast To Coast Express, Defendants.

Civ. A. No. C-85-972-G.
March 3, 1986.

Stipulation of Procedures March 25, 1986.

Plaintiff moved to take a telephonic deposition
of an out-of-state witness. The District Court, Russell
A. Eliason, United States Magistrate, held that plain-
tiff was entitled to take telephonic deposition.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚔ 1359

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others
Pending Action
170AX(C)2 Proceedings
170Ak1355 Protective Orders
170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

Procedural rule [Fed.Rules Civ.Proc.Rule
30(b)(7), 28 U.S.C.A.] governing telephonic deposi-

tions should be construed in pari materia with proce-
dural rule [Fed.Rules Civ.Proc.Rule 30(b)(4), 28
U.S.C.A.] encouraging use of experimentation in
taking depositions which are recorded by other than
stenographic means; both have joint purpose of re-
ducing cost of federal litigation by providing alterna-
tives to traditional stenographic depositions.

[2] Federal Civil Procedure 170A ⚔ 1359

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others
Pending Action
170AX(C)2 Proceedings
170Ak1355 Protective Orders
170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

Leave to take telephonic deposition should be
liberally granted in appropriate cases. Fed.Rules
Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ⚔ 1359

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others
Pending Action
170AX(C)2 Proceedings
170Ak1355 Protective Orders
170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

In ruling on motions for telephonic depositions, a
court may appropriately exercise its discretion with
caution in order to protect integrity of deposition
process and assure that no one is truly prejudiced by
employment of the new and relatively untested

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method. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[4] Federal Civil Procedure 170A  1359

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)2 Proceedings

170Ak1355 Protective Orders

170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

Upon giving legitimate reason for taking deposition telephonically, movant need not further show extraordinary need for deposition; rather, burden is on opposing party to establish why deposition should not be conducted telephonically. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[5] Federal Civil Procedure 170A  1359

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)2 Proceedings

170Ak1355 Protective Orders

170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

In civil cases, better rule is that request for telephonic deposition should not be denied on mere conclusory statement that it denies opportunity for face-to-face confrontation. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[6] Federal Civil Procedure 170A  1359

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)2 Proceedings

170Ak1355 Protective Orders

170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

Party opposing telephonic deposition must come forward with particularized showing as to why telephonic deposition would prejudice it. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[7] Federal Civil Procedure 170A  1359

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)2 Proceedings

170Ak1355 Protective Orders

170Ak1359 k. Time and place of,
and procedure for, taking. Most Cited Cases

Plaintiff, who asserted financial hardship in traveling to California to depose witness, was entitled to take a telephone deposition notwithstanding fact that defendant would not be permitted face-to-face confrontation with witness. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

***430** David B. Puryear, Jr., Greensboro, N.C., for plaintiff.

W.T. Cranfill, Jr., John C. Miller, Blakeney, Alexander & Machen, Charlotte, N.C., for defendants.

MEMORANDUM ORDER

RUSSELL A. ELIASON, United States Magistrate.

Plaintiff moves pursuant to Rule 30(b)(7), Fed.R.Civ.P., to take the telephonic deposition of William Scott, a resident of the State of California.

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She states that this witness has knowledge of facts central to the issues in this action, and that he was her supervisor at the time both of them were employed by defendants. Plaintiff alleges that due to her lack of financial means, she needs to depose the witness by telephone.

Defendants oppose the motion. They assert plaintiff must show extraordinary circumstances in order to be permitted to take a telephonic deposition. First, they argue that it is imperative to cross-examine the witness under conditions which proximate trial conditions since plaintiff intends to use Scott's deposition as substantive evidence at the trial. According to defendants, this means they must be permitted an opportunity to observe the witness. Second, defendants state that plaintiff fails to show good cause for a telephonic deposition on grounds of financial necessity since plaintiff has not submitted a financial affidavit. Defendants rely on three cases as supporting their position, citing *Clem v. Allied Van Lines International Corp.*, 102 F.R.D. 938 (S.D.N.Y.1984); *Southern Seas Shipping Co., Ltd. v. Blue Anchor, Inc., et al.*, No. 83-3851 (E.D.Pa. April 5, 1985); and *United States v. Ferrera*, 746 F.2d 908 (1st Cir.1984). Defendants state that the one case permitting a telephonic deposition pursuant to Rule 30(b)(7), did so without any discussion of the relevant issues. See *Coyne v. Houss*, 584 F.Supp. 1105 (E.D.N.Y.1984). The Court disagrees with defendants' interpretation of Rule 30(b)(7) and finds the cited cases to be inapposite.

In 1980, Rule 30(b) was amended to permit the taking of telephonic depositions. The Rule now provides:

The parties may stipulate in writing or the Court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer ques-

tions propounded to him.

Rule 30(b)(7), Fed.R.Civ.P.

Nothing in the language of Rule 30(b)(7) requires that a telephonic deposition may only be taken upon a showing of necessity, financial inability, or other hardship. Nor do the Advisory Committee Notes give any reason to imply such restrictions were intended as conditions for issuing an order to conduct telephonic depositions.^{FN1} However, by looking to a concomitant 1980 amendment*431 to Rule 30, one discerns a purpose to encourage the courts to be more amenable to employing non-traditional methods for conducting depositions, such as telephonic depositions, in order to reduce the cost of federal litigation. In the same year that subsection (b)(7) was added, Rule 30(b)(4) was amended to further encourage the use of and experimentation in taking depositions which are recorded by other than stenographic means. Previously, a party had to apply for a court order. With the 1980 amendment, the parties could stipulate to a non-stenographic deposition. The Advisory Committee Notes state the purpose for this amendment was to encourage use of electronic depositions.

FN1. The Advisory Committee Notes do not disclose the purpose for adding subsection (b)(7) or supply standards for issuing orders permitting telephonic depositions. The Note simply provides:

Depositions by telephone are now authorized by Rule 29 upon stipulation of the parties. The amendment authorized that method by order of the court. The final sentence is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than that where the questions

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are propounded.

[1] The Court finds Rule 30(b)(7) should be construed *in pari materia* with subsection (b)(4). Both have a joint purpose of reducing the cost of federal litigation by providing alternatives to traditional stenographic depositions. The courts have not required a showing of extraordinary circumstances before granting Rule 30(b)(4) motions. *See* 8 Wright, Miller & Elliot, *Federal Practice and Procedure* § 2115 at 176–181 (Supp.1985).^{FN2} Likewise, no reason appears for imposing harsh or unusual requirements before permitting telephonic depositions.

FN2. Indeed, in the District of Columbia Circuit, the court has stated that a trial court's discretion in ruling on a Rule 30(b)(4) deposition is limited to concerns of accuracy and trustworthiness. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C.Cir.1975). While other courts would not so restrict a district court to those issues in deciding whether to permit non-stenographic depositions, neither have they imposed standards which would discourage use of non-stenographic depositions. *See In Re Sessions*, 672 F.2d 564 (5th Cir.1982); *Westmoreland v. CBS, Inc.*, 584 F.Supp. 1206 (D.C.1984)—(fear that videotaped deposition may be used to abuse non-party witness sufficient to deny Rule 30(b)(4) motion).

[2][3][4] Because of the history and similar purpose of subsections (b)(4) and (b)(7), the Court concludes that leave to take telephonic depositions should be liberally granted in appropriate cases. This construction accords with the purpose for permitting telephonic depositions, which necessarily must have been to encourage courts to experiment with non-traditional means of taking depositions. In ruling on motions for telephonic depositions, a court may appropriately exercise its discretion with caution in or-

der to protect the integrity of the deposition process and assure that no one is truly prejudiced by employment of this new and relatively untested method. However, until experience demonstrates otherwise, no reason now appears for establishing a rule requiring the moving party to show necessity. Thus, upon giving a legitimate reason for taking a deposition telephonically, the movant need not further show an extraordinary need for the deposition. Rather, the burden is on the opposing party to establish why the deposition should not be conducted telephonically.

Defendants' citation of authority is not to the contrary. In *Clem v. Allied Van Lines International Corp.*, *supra*, the court denied plaintiffs' request to take his telephonic deposition outside the district based on its long standing policy of requiring non-resident plaintiffs to be deposed within the district. It was in this context that the court stated that plaintiff would be required to show extreme hardship in order to be permitted to have his deposition taken telephonically outside the district. The decision, thus, involves the court's policy with respect to having plaintiffs deposed within the forum and not a general rule covering Rule 30(b)(7) depositions.

In *Southern Seas Shipping Co., Ltd. v. Blue Anchor, Inc.*, *supra*, the court denied a request to depose two non-party witnesses who would authenticate documents in order to establish a claim. There, the court noted that the witnesses were not parties, but were Chilean nationals and that a telephonic deposition outside of the United States was not appropriate. The Court held that the depositions should be taken by traditional means in view of Rule 28(b), Fed.R.Civ.P., which provides for the taking of depositions in foreign countries and in view of 28 U.S.C. § 1781 (providing for letter rogatories). In *Clem*, the deponent-*432 plaintiff also wanted to be deposed outside the United States. Thus, in both *Clem* and *Southern Seas*, the decision denying the telephonic deposition had ample justification on the grounds that the depositions were simply not authorized since they

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were to take place outside of the United States.^{FN3} However, that issue is not before the Court, as the witness here will be deposed within the United States.

FN3. The very terms of Rule 30(b)(7) makes it questionable whether telephonic depositions are authorized outside of the United States or its territories or insular possessions. The last sentence of the subsection provides that for purposes of the Rule, a telephonic deposition is taken in the district and place where the deponent answers the questions, and cites Rule 28(a), but not Rule 28(b). The omission of Rule 28(b), which governs depositions in foreign countries, was likely intentional in recognition of the difficulties, in general, encountered in conducting foreign depositions. See 8 Wright & Miller, *Federal Practice and Procedure*, § 2083 (1970). In light of the sensitive nature of foreign depositions, the drafters may have felt that the time was not yet ripe for United States courts to order telephonic depositions in foreign countries.

Defendants urge that the Court deny the telephonic deposition on the grounds that they will be denied face-to-face contact with the witness. They cite *United States v. Ferrera*, *supra*, in support of this rationale. However, that case involved a criminal prosecution. The Court stated it was reluctant to permit any kind of deposition in a criminal case because of the policy favoring live testimony and, therefore, was even less sympathetic with a telephonic deposition which would further isolate the witness from the trial process. The court stated that it would require a strong showing of necessity before authorizing such a procedure. (Also, the deponent was located outside the United States.) Because *Ferrera* involved concerns unique to criminal prosecutions, the Court does not find it authority for construing Rule 30(b)(7).

[5][6] In civil cases, the better rule is that a request for a telephonic deposition should not be denied on the mere conclusory statement that it denies the opportunity for face-to-face confrontation. Unlike criminal cases, depositions of unavailable witnesses are routinely read to the jury. Reading a telephonic deposition will be no different than reading any other deposition. The only change created by a telephonic deposition is that the attorneys cannot see the witness. However, telephone conferences are becoming an increasing reality in business and law. Finally, lack of face-to-face questioning is the very essence of a telephonic deposition. Acceptance of defendants' argument would be tantamount to repealing subsection (b)(7). Thus, the party opposing the telephonic deposition must come forward with a particularized showing as to why a telephonic deposition would prejudice it. With respect to the instant case, defendants complain that a witness may be coached at a telephonic deposition. However, as will be seen later, the officer who administers the oath to the witness will likely be present to report such conduct. And, in any event, the Court finds that unverified concern to be insubstantial.^{FN4}

FN4. If defendants truly had a concern regarding the coaching of the witness, it would seem that they would have requested permission to fly to California to confront the witness while plaintiff took the witness' deposition over the telephone in North Carolina. That procedure would eliminate all of defendants concerns and still accommodate plaintiff's desires as well. However, neither party has raised this issue and the Court does not express any opinion on the permissibility of such a procedure.

[7] The Court concludes that defendants have failed to meet their burden of showing the Court that a telephonic deposition would not be appropriate in this case. Plaintiff has alleged a financial hardship in traveling to California, which, it is noted, not only

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involves purchasing a plane ticket but counsel's travel time as well. The Court finds that plaintiff has stated a legitimate reason for requesting a telephonic deposition and defendants have failed to identify any legitimate source of concern which would persuade the Court to deny the motion. Therefore, plaintiff's motion will be granted. However, one issue must be resolved before the deposition may proceed.

*433 Plaintiff has not indicated to the Court how she intends to comply with Rule 28(a) which requires that depositions be taken before an officer authorized to administer oaths. Rule 30(b)(7) states that a deposition is deemed to be taken in the district and place where the deponent answers questions propounded to him. Consistent construction of both these rules would seem to require that, for this out-of-state telephonic deposition, the witness must be administered the oath by a person who is in the witness' presence at the place of deposition. This person may or may not be the stenographer. Neither side has addressed this issue. The parties will be requested to resolve the matter themselves and submit a stipulation to the Court. Failing to do so, plaintiff will be required to submit a plan to the Court and move for an additional order.

IT IS THEREFORE ORDERED that plaintiff's motion to be permitted to conduct a telephonic deposition of William Scott in Richmond, California, is granted on the condition that plaintiff submit to the Court for its approval a stipulation between the parties concerning the mechanics of taking the deposition and should the parties fail to agree and obtain the Court's approval, plaintiff shall be required to request further relief from the Court.

**STIPULATION OF PROCEDURES TO BE
UTILIZED FOR TAKING DEPOSITION BY
TELEPHONE**

For purposes of this action, in which plaintiff alleges violations of the Equal Pay Act, 29 U.S.C. § 206, and Title VII of the Civil Rights Act, 42 U.S.C.

§ 2000e *et seq.*, and pursuant to the Court's Order of March 3, 1986, the plaintiff and the defendants, by and through their undersigned counsel, stipulate and agree that the telephonic deposition of William Scott shall be taken utilizing the following procedures:

1. The witness, William Scott, will be present in the State of California in the County of Contra Costa, at or near the City of Richmond, before a Notary Public of the State of California or some other officer authorized under the laws of the State of California to administer oaths.

2. The stenographer who will record the deposition of the witness will be present at the same place with the witness, in the State of California.

3. Present with the witness and the transcribing stenographer will be a telephone equipped with a speaker to allow the witness and the stenographer simultaneously to hear the questions propounded via telephone by counsel for the plaintiff and defendants.

4. Counsel for the parties will be present together at the offices of counsel for the defendants, in Charlotte, North Carolina, where counsel will conduct their examination of the witness by use of a telephone equipped with a speaker to allow them simultaneously to hear the responses of the witness to the interrogatories, as the witness makes his response before the stenographer in California.

5. Utilizing the foregoing procedure, the deposition by telephone of the witness, William Scott, will be taken upon oral examination at 2:00 o'clock p.m., Eastern Standard Time (11:00 a.m. Pacific Standard Time), on the 27th day of March, 1986, and will continue from day to day until completed.

6. It is expressly understood and agreed between all parties and counsel that by stipulating to the matters contained in this document, the defendants do not

109 F.R.D. 429, 4 Fed.R.Serv.3d 943

(Cite as: 109 F.R.D. 429)

waive and are not estopped from raising on appeal questions regarding the propriety of this deposition or the decision and order of the Court which required the taking of this deposition.

M.D.N.C.,1986.

Jahr v. IU Intern. Corp.

109 F.R.D. 429, 4 Fed.R.Serv.3d 943

END OF DOCUMENT

**EXHIBIT Z OF
MINOR DECLARATION**

170 F.R.D. 20

(Cite as: 170 F.R.D. 20)

H

United States District Court,
D. Kansas.

Leroy CRESSLER, Plaintiff,

v.

John Rapp NEUENSCHWANDER, M.D., and John
Rand Neuenschwander, M.D., Defendants.

Civil Action No. 95-1034-DES.

Dec. 9, 1996.

Medical malpractice plaintiff moved for order to allow telephonic depositions of physicians located in another state, and to prohibit either plaintiff's counsel or defense counsel from being present in person with physicians at time of depositions. The District Court, Saffels, Senior District Judge, held that plaintiff could take depositions telephonically based on desire to save money, but defense counsel could be present in person in view of voluminous documents involved in case.

Motion granted in part, denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited

Cases

Medical malpractice plaintiff could depose three physicians telephonically for the reason that physicians were located in another state and telephonic depositions would save money. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited

Cases

Medical malpractice plaintiff was not entitled to an order preventing defense counsel from being present with out-of-state physicians during telephonic depositions by plaintiff, in view of difficulty for defense counsel of identifying, marking, and using the physicians' extensive medical records during telephonic depositions, and difficulty of cross-examining them using medical articles and journals. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited

Cases

Party seeking to depose a witness telephonically must present a legitimate reason for its request; burden then shifts to opponent to show why the deposi-

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(Cite as: 170 F.R.D. 20)

tion should proceed by a more traditional method.
Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

In determining whether to permit party to depose a witness telephonically, court must consider whether use of telephonic means would reasonably ensure accuracy and trustworthiness, and whether opposing party would be prejudiced. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

Party's ability to see a key witness and judge his demeanor is important consideration in the decision to permit a telephonic deposition. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1381 k. In general. Most Cited
Cases

Existence of voluminous documents which are central to a case may preclude a telephonic deposition. Fed.Rules Civ.Proc.Rule 30(b)(7), 28 U.S.C.A.

***21** Thomas Clayton Boone, Hays, KS, Gene E. Schroer, Schroer, Rice, P.A., Topeka, KS, for Leroy E. Cressler.

Matthew L. Bretz, Gilliland & Hayes, P.A., Hutchinson, KS, for John Rapp Neuenschwander, M.D., John Rand Neuenschwander, M.D.

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

This is a medical malpractice action in which the plaintiff claims that the defendants were negligent and departed from standard medical care. Now before the court is the plaintiff's Amended Motion for Order to Allow Telephonic Depositions of Dr. Golitz, Dr. Dreiling and Dr. Gonzales (Doc. 109).

[1][2] The plaintiff seeks an order allowing the taking of the depositions of Loren Golitz, M.D., Lyndah Dreiling, M.D., and Rene Gonzales, M.D. by telephonic means in order to reduce costs. Fed.R.Civ.P. 30(b)(7) provides that "[t]he parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone." The plaintiff also asks the court to order that neither the plaintiff's counsel nor defense counsel be present in person with the witnesses when the depositions are taken. The plaintiff maintains that if either attorney attends the depositions in person, the other attorney will feel obliged to also appear in person.

The defendants do not object to the plaintiff's appearing and deposing the witnesses via telephonic means. The defendants ask, however, that they not be

170 F.R.D. 20

(Cite as: 170 F.R.D. 20)

precluded from being present in person at the depositions.

[3][4] The party seeking to depose a witness telephonically must present a legitimate reason for its request. *Jahr v. IU Int'l Corp.*, 109 F.R.D. 429, 431 (M.D.N.C.1986). The burden then shifts to the opponent to show why the deposition should proceed by a more traditional method. *Id.* at 431. The court must consider whether the use of telephonic means would reasonably ensure accuracy and trustworthiness, and whether the opposing party would be prejudiced. *Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444, 447 (W.D.Mich.1993).

The plaintiff submits that Drs. Golitz, Dreiling, and Gonzales are located in Denver, Colorado, and that allowing him to depose the witnesses telephonically would reduce the costs of taking the depositions. The court finds that the plaintiff's desire to save money constitutes a legitimate reason to conduct the depositions telephonically. The defendants, however, claim that they would be prejudiced in several ways if precluded from personally attending the evidentiary depositions. The defendants assert that (1) they would be prevented from effectively evaluating the witnesses' demeanor; (2) it would be difficult for the court reporter to accurately record everything said by the witnesses and attorneys; and (3) the defendants would be unable to examine files maintained by the witnesses.

[5] A party's ability to see a key witness and judge his demeanor are important considerations in the decision to permit a telephonic deposition. *Anguile v. Gerhart*, Civ.A. No. 93-934 (HLS), 1993 WL 414665, at *3 (D.N.J. Oct. 7, 1993) (granting plaintiff's motion for initial telephonic deposition, provided that second deposition would be in person). On the other hand, telephonic depositions inherently lack face-to-face questioning, and to deny a request to conduct a telephonic deposition solely because of the opponent's inability to observe the witness would

be tantamount to repealing Fed.R.Civ.P. 30(b)(7). *Jahr*, 109 F.R.D. at 432. Similarly, the defendants' second proffered reason for conducting the depositions in person, i.e., that it would be difficult for the court reporter to accurately record everything that is said, would seem to be no more persuasive in this case than in any other in which telephonic depositions are sought.

[6] The defendants' third reason for being present at the depositions, however, is *22 more compelling. The defendants submit that it would be extremely difficult to identify, mark, and utilize the witnesses' extensive medical records during a telephonic deposition, or to use medical articles and journals to cross-examine the witnesses. The existence of voluminous documents which are central to a case may preclude a telephonic deposition. *Fireman's Fund Ins. Co. v. Zoufaly*, No. 93 Civ. 1890 (SWK), 1994 WL 583173, at *1 (S.D.N.Y. Oct. 21, 1994); see also *Mercado v. Transoceanic Cable Ship Co.*, CIV.A. No. 88-5335, 1989 WL 83596 (E.D.Pa. July 25, 1989).

The court finds that the best solution in this case is to grant the plaintiff's motion for an order allowing the taking of the depositions of Drs. Golitz, Dreiling, and Gonzales by telephonic means, but to deny the plaintiff's request that the court order that neither plaintiff's counsel nor defense counsel attend the depositions in person. The plaintiff has provided the court with no authority, and the court has located none, which would restrain the defendant from being present during these depositions. See 4A James W. Moore, *Moore's Federal Practice* ¶ 30.09[5], at 30-114 n. 20 (2d ed. 1996) (Rule 30(b)(7) does not specify that a party may not be present during a telephonic deposition; so long as the voices of all the participants are transmitted, the deposition may fairly be characterized as taken by telephone under the rule). "[I]f the party seeking the deposition is prepared to conduct its portion without a face-to-face encounter with the witness, there is no reason not to permit it to do so, with any other party free to ques-

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tion the witness in person, thus avoiding any prejudice while reducing expenses.” *Fireman's Fund*, 1994 WL 583173, at *1; *see also Jahr*, 109 F.R.D. at 432 n. 4 (where plaintiff lacked financial resources and defendant was concerned about lack of face-to-face questioning, procedure by which plaintiff took deposition over the telephone and defendant appeared in person “would eliminate all of defendants [sic] concerns and still accommodate plaintiff’s desires as well”).

IT IS THEREFORE BY THE COURT ORDERED that the plaintiff’s Amended Motion for Order to Allow Telephonic Depositions of Dr. Golitz, Dr. Dreiling and Dr. Gonzales (Doc. 109) is granted in part and denied in part. The plaintiff’s motion for an order allowing telephonic depositions of Drs. Golitz, Dreiling, and Gonzales is granted. The plaintiff’s motion for an order that neither party’s counsel be present in person when the depositions are taken is denied.

IT IS FURTHER ORDERED that the plaintiff’s Motion for Order to Allow Telephonic Depositions of Dr. Golitz, Dr. Dreiling and Dr. Gonzales (Doc. 108) is denied as moot.

D.Kan.,1996.

Cressler v. Neuenschwander

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**EXHIBIT AA OF
MINOR DECLARATION**

270 F.R.D. 26
(Cite as: 270 F.R.D. 26)

H

United States District Court,
District of Columbia.
UNITED STATES of America ex rel. Harry
BARKO, Plaintiff,
v.
HALLIBURTON COMPANY, et al., Defendants.

Civil Action No. 05–1276 (EGS).
Oct. 14, 2010.

Background: In qui tam action brought by contract administrator against his former employer and related defendants, defendants moved for protective orders.

Holdings: The District Court, Emmet G. Sullivan, J., held that:

- (1) order granting limited jurisdictional discovery against defendant seeking to dismiss qui tam complaint of former contract administrator for lack of personal jurisdiction, did not authorize administrator to seek discovery from defendants who asserted no jurisdictional defenses;
- (2) deposition of defendant corporation in Amman, Jordan was appropriate; and
- (3) administrator's jurisdictional discovery from defendant corporation was to be limited to time period prior to filing of complaint.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 🔑 1271.5

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General

170Ak1271.5 k. Protective orders. Most
Cited Cases

Federal Civil Procedure 170A 🔑 1275.5

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1275.5 k. Jurisdictional discovery.
Most Cited Cases

Order granting limited jurisdictional discovery against defendant, seeking to dismiss qui tam complaint of former contract administrator for lack of personal jurisdiction, did not authorize administrator to seek discovery from defendants who asserted no jurisdictional defenses, and instead, sought to dismiss action for failure to state claim upon which relief could be granted, and thus protective order was appropriate; order limited administrator to one document request of defendant seeking dismissal on jurisdictional grounds, and administrator failed to demonstrate why defendants' position in related case was relevant to whether administrator should be entitled to jurisdictional discovery against defendants. Fed.Rules Civ.Proc.Rule 12(b)(2, 6), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 🔑 1275.5

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1275.5 k. Jurisdictional discovery.
Most Cited Cases

A plaintiff who is permitted to conduct jurisdictional discovery is entitled to precisely focused discovery aimed at addressing matters relating to personal jurisdiction.

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(Cite as: 270 F.R.D. 26)

[3] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

A corporation's deposition should be held in its principal place of business. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

Deposition of defendant corporation in Amman, Jordan, its principal place of business, was appropriate in qui tam action brought by former contract administrator against his former employer and related defendants; defendant corporation explicitly agreed it would appeal for jurisdictional deposition pursuant to Federal Rules of Civil Procedure, and expense and inconvenience of deposition in Jordan was insufficient basis to order corporation to appear for deposition in United States. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1275.5

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1275.5 k. Jurisdictional discovery.
Most Cited Cases

In qui tam action brought by former contract administrator against defendant corporation, administrator's jurisdictional discovery from corporation was to be limited to time period prior to filing of complaint; it was unnecessary to further tailor topics included in administrator's deposition notice to corporation, however, since although topics were broadly worded, administrator provided adequate explanation of their relevance to jurisdictional issues and would not ask questions beyond scope of corporation's jurisdictional ties to United States. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

***26** Anthony C. Munter, David K. Colapinto, Michael David Kohn, Stephen M. Kohn, Kohn, Kohn & Colapinto, P.C., Washington, DC, for Plaintiff.

***27** John Martin Faust, Alden Lewis Atkins, John Randall Warden, Vinson & Elkins, LLP, Washington, DC, Daniel H. Bromberg, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Redwood Shores, CA, Christine H. Chung, Quinn Emanuel Urquhart Oliver & Hedges, LLP, New York, NY, Christopher Tayback, Scott L. Watson, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA, for Defendants.

MEMORANDUM OPINION

EMMET G. SULLIVAN, District Judge.

Pending before the Court are two motions for protective orders filed by defendants in response to discovery requests made by plaintiff Harry Barko. The first motion was jointly filed by defendants Haliburton Company, Kellogg Brown and Root, Inc., Kellogg Brown & Root Services, Inc., KBR Technical Services Inc., Kellogg Brown & Root Engineering Corporation, Kellogg Brown & Root International, Inc. (a Delaware Corporation), and Kellogg

270 F.R.D. 26

(Cite as: 270 F.R.D. 26)

Brown & Root International, Inc. (a Panamanian Corporation) (collectively, the “KBR defendants”). A separate motion for a protective order was filed by defendant Daoud & Partners, Ltd. (“Daoud”). Upon consideration of defendants' motions, the responses and replies thereto, the applicable law, and the entire record herein, and for the following reasons, the Court hereby **GRANTS** the KBR defendants' motion for a protective order, and **GRANTS IN PART AND DENIES IN PART** Daoud's motion for a protective order.

I. BACKGROUND

Plaintiff filed this *qui tam* action in June 2005 against the KBR defendants, Daoud, and another defendant. Plaintiff, who was a contract administrator for one of the defendants, alleges that defendants used a subcontracting procedure that inflated the costs of constructing laundry facilities and services on military bases in Iraq.

The KBR defendants and Daoud filed separate motions to dismiss the plaintiff's complaint. The KBR defendants' motion to dismiss asserts no jurisdictional defenses; they argue the case should be dismissed for failure to state a claim under Federal Rule of Civil Procedure Rule 12(b)(6) and for failure to plead fraud with particularity under Rule 9(b). Daoud's motion to dismiss, on the other hand, argues that the Court lacks personal jurisdiction over it. In response, the Court entered an Order on June 17, 2010 permitting limited jurisdictional discovery. After the Court entered the June 17, 2010 Order, plaintiff served document requests on both Daoud and the KBR defendants. In addition, he noticed a Rule 30(b)(6) deposition of Daoud, as well as a Rule 30(b)(6) deposition of the KBR defendants. The defendants filed their motions for protective orders shortly thereafter.

II. ANALYSIS

The KBR defendants' motion for a protective order seeks an order stating that the KBR defendants

shall not be required to answer any discovery requests or appear for any depositions until further order of the Court. It argues that (i) the Court only authorized limited jurisdictional discovery against Daoud, not the KBR defendants, and (ii) the requests are unreasonable, duplicative, unduly burdensome, and cover topics related to the merits of the case rather than jurisdictional issues. Daoud's motion for a protective order objects only to the deposition noticed by plaintiff. Daoud asks that the Court order that the deposition of Daoud's Rule 30(b)(6) witness take place in Amman, Jordan rather than Washington, DC. In addition, Daoud argues that the topics noticed by the plaintiff are overbroad and irrelevant to the question of jurisdiction. The motions filed by the KBR defendants and Daoud are now addressed in turn.

A. The KBR Defendants' Motion for a Protective Order

The KBR defendants' primary argument is that the Court's June 17th Order only authorized the plaintiff to obtain discovery from Daoud, the party that raised a jurisdictional defense, not the KBR defendants. Plaintiff disputes the KBR defendants' interpretation of the Court's July 17th Order, arguing that Court “did not place any explicit limits as to which parties are subject to the discovery.” *28 Pl.'s Opp'n to KBR Defs.' Mot. at 10. For the following reasons, the Court finds plaintiff's interpretation unpersuasive.

[1] The Court's July 17, 2010 Order states, in part, as follows:

Upon consideration of defendant Daoud's motion to dismiss, response and reply thereto, and substantially for the reasons stated by plaintiff, the Court finds that jurisdictional discovery is appropriate. Jurisdictional discovery is limited to three depositions and a request for production of documents.... The parties are directed to file a joint status report, including a recommendation for further proceedings, by no later than August 15, 2010. In the event that counsel are unable to agree on a joint recom-

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(Cite as: 270 F.R.D. 26)

mendation, each party shall file an individual recommendation by that time.

The language of the July 17th Order makes it clear that the Court's grant of limited jurisdictional discovery was intended to allow plaintiff to seek discovery only against Daoud. In particular, the Court prefaced the sentence granting jurisdictional discovery with the language "[u]pon consideration of defendant Daoud's motion to dismiss" and limited the plaintiff to one document request.

[2] Nor has plaintiff provided any persuasive reason why jurisdictional discovery against the KBR defendants, particularly in the form of broadly worded requests relating to another defendant, is warranted under these circumstances. A plaintiff who is permitted to conduct jurisdictional discovery is entitled to "precisely focused discovery aimed at addressing matters relating to personal jurisdiction." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1352 (D.C.Cir.2000).

Plaintiff includes in his opposition to the motion by the KBR defendants a lengthy discussion of the KBR defendants' role in another case, namely *Adhikari v. Daoud & Partners*, No. 09-1237, pending in the District Court for the Southern District of Texas. According to plaintiff, some or all of the KBR defendants are also named as defendants in the Texas action, and these KBR defendants have taken the position that Daoud is subject to personal jurisdiction in that case. Plaintiff argues that, as a result of their stance in the Texas action, the KBR defendants "must have information that supports [their] litigation position that there exists personal jurisdiction over Daoud in the United States." Pl.'s Opp'n to KBR Defs.' Mot. at 8. Plaintiff claims that he is entitled to this information. The Court finds this argument unpersuasive, as plaintiff fails to demonstrate why the KBR defendants' position in the Texas case is relevant to whether plaintiff should be entitled to jurisdictional discovery against the KBR defendants in this action.

In light of the language of the June 17th Order and the limited scope of the jurisdictional discovery, a protective order barring plaintiff from seeking discovery against the KBR defendants at this time is hereby **GRANTED**.

B. Daoud's Motion for a Protective Order

1. The Location of the Deposition

Daoud seeks an order requiring that any Rule 30(b)(6) deposition of Daoud be conducted in Amman, Jordan. In support of its position, Daoud cites to case law indicating that the deposition of a corporation should ordinarily be taken at its principal place of business. *See, e.g., Nat'l Cmty. Reinvestment Coal. v. Novastar Fin., Inc.*, 604 F.Supp.2d 26, 31 (D.D.C.2009); *Work v. Bier*, 107 F.R.D. 789, 793 n. 4 (D.D.C.1985).

Plaintiff concedes that there is a general presumption that a deposition should take place at the corporation's principal place of business, but he argues that there is sufficient justification to deviate from the presumption in this case. In particular, plaintiff argues that (i) the case involves a foreign deponent; (ii) Jordan is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and thus, according to plaintiff, "any deposition taken in Jordan, for which the deponent has not agreed to conduct the deposition under the Federal Rules of Civil Procedure, will be taken according to Jordanian law"; (iii) there are no commercial stenographer services available for voluntary *29 depositions in Jordan, and the parties would therefore be required to bring someone from the United States for this purpose; (iv) if Daoud's representative refuses to answer questions at the deposition, the plaintiff would be forced to use the complex, time-consuming letter rogatory process resulting at best in testimony taken according to Jordanian law; (v) the defendant's discovery conduct suggests that it will be "uncooperative or obstructionist" and likely to lead to discovery disputes requiring

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judicial intervention; and (vi) balancing the cost and capability to travel of the two parties, having the deposition in Jordan puts a greater burden on the plaintiff than would be on the defendant if the deposition were conducted in the United States. Pl.'s Opp'n to Daoud's Mot. at 9–15.

[3][4] After careful consideration of plaintiff's arguments, the Court concludes that it need not deviate from the general rule that a corporation's deposition should be held in its principal place of business. Unlike the circumstances in *Triple Crown America, Inc. v. Biosynth AG*, No. 96–7476, 1998 WL 227886, 1998 U.S. Dist. LEXIS 6117 (E.D.Pa. April 30, 1998) or *In re Honda American Motor Co.*, 168 F.R.D. 535 (D.Md.1996) cited by plaintiff, the instant case does not involve a foreign jurisdiction in which the taking of a deposition pursuant to the Federal Rules was barred by the law of the foreign country. On the contrary, Daoud has explicitly agreed that it “will appear for this jurisdictional deposition in Amman, Jordan pursuant to the Federal Rules.” Daoud's Mem. at 5. Plaintiff fails to cite a single case ordering the deposition of a foreign corporation to take place in the United States when the foreign corporation was contesting personal jurisdiction and consented to a deposition abroad in accordance with the Federal Rules.

To the extent that plaintiff objects to the expense and inconvenience of a deposition in Jordan, this is an insufficient basis to order the defendant to appear for a deposition in the United States. Nor do the facts of this case warrant compelling a deposition in the United States based on the speculative statement by the plaintiff that the deposition may require judicial intervention. Accordingly, the Court hereby **ORDERS** that the Rule 30(b)(6) deposition of Daoud shall take place in Amman, Jordan.^{FN1}

FN1. Nothing in this Order or in the Court's June 17, 2010 Order, however, is intended to affect the parties rights under Rule 30(b)(4)

of the Federal Rules of Civil Procedure providing that “[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule ... the deposition takes place where the deponent answers the questions.” Fed.R.Civ.P. 30(b)(4).

Plaintiff has also requested that, in the event the deposition of Daoud must take place in Jordan, the Court order Daoud to bear the costs of conducting the deposition, including the costs of traveling and bringing a stenographer to Jordan. The Court finds no basis for granting this request. Accordingly, plaintiff's request is **DENIED**.

2. Scope of Deposition Topics

[5] Daoud argues that all of plaintiff's topics, because they lack temporal restrictions, are overbroad. In addition, Daoud argues that many of the 34 topics included in plaintiff's deposition notice go beyond purely jurisdictional issues. The Court agrees and finds that plaintiff's jurisdictional discovery should be limited to the time period prior to the filing of the complaint. See *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1300–1301 (D.C.Cir.1996); *Allen v. Russian Fed'n*, 522 F.Supp.2d 167, 193 (D.D.C.2007).

At this time, however, the Court finds it unnecessary to further tailor the topics included in plaintiff's deposition notice to Daoud. Though the topics are broadly worded, plaintiff has provided an adequate explanation of their relevance to jurisdictional issues and asserts that he “does not intend to ask questions beyond the scope of Daoud's jurisdictional ties to the United States.” Pl.'s Opp'n to Daoud's Mot. at 17. Plaintiff is admonished to tailor his questions during the deposition accordingly.

III. CONCLUSION

Therefore, for the reasons set forth above, it is by

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(Cite as: 270 F.R.D. 26)

the Court hereby

***30 ORDERED** that the KBR defendants' motion for a protective order is **GRANTED**; and it is

FURTHER ORDERED that Daoud's motion for a protective order is **GRANTED IN PART AND DENIED IN PART**. The Rule 30(b)(6) deposition of Daoud shall take place in Amman, Jordan. The remaining portions of Daoud's motion for a protective order are **DENIED**. An appropriate Order accompanies this Memorandum Opinion.

D.D.C., 2010.

U.S. ex rel. Barko v. Halliburton Co.

270 F.R.D. 26

END OF DOCUMENT

**EXHIBIT BB OF
MINOR DECLARATION**

137 F.R.D. 356

(Cite as: 137 F.R.D. 356)

H

United States District Court,
D. Kansas.

Jack F. MOORE and John M. Grau, in their representative capacities as Trustees of the National Electrical Contractors Association Pension Benefit Trust Fund,
Plaintiffs,

v.

PYROTECH CORPORATION and Coastal Resources, Inc., Defendants.

Civ. A. No. 90-2178-O.
June 25, 1991.

Pension fund was ordered to depose specific officer and director of defendant corporation in Canada by magistrate judge. Pension fund moved to review order. The District Court, Earl E. O'Connor, Chief Judge, held that pension fund was entitled to depose specifically named officer and director of defendant corporation at defendant's principal place of business.

Motion granted.

West Headnotes

[1] United States Magistrates 394 🔑 29

394 United States Magistrates

394k24 Review and Supervision by District Court

394k29 k. Clear or manifest error. Most Cited Cases

District judge's scope of review of magistrate judge's determination is limited to whether order is clearly erroneous or contrary to law. 28 U.S.C.A. §

636(b)(1)(A); Fed.Rules Civ.Proc.Rule 72(a), 28 U.S.C.A.; U.S.Dist.Ct.Rules D.Kan., Magistrates Rule 604(a).

[2] Federal Civil Procedure 170A 🔑 1325

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)1 In General

170Ak1323 Persons Whose Depositions May Be Taken

170Ak1325 k. Officers and employees of corporations. Most Cited Cases

Pension fund was entitled to depose specifically named officer and director of defendant corporation at defendant's corporate offices and main place of business, even though, defendant had not identified specified deponent as corporate representative. Fed.Rules Civ.Proc.Rule 30(b)(1, 6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 🔑 1325

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

170AX(C)1 In General

170Ak1323 Persons Whose Depositions May Be Taken

170Ak1325 k. Officers and employees of corporations. Most Cited Cases

Deposing party may name corporation as deponent in its notice and then allow corporation to designate one or more employees to testify on its behalf as representatives; alternatively, deposing party may

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specifically name as deponent corporate employee, and if named employee is a director, officer, or managing agent of corporation, such employee will be regarded as representative of corporation. Fed.Rules Civ.Proc.Rule 30(b)(1, 6), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1325

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)1 In General

170Ak1323 Persons Whose Depositions May Be Taken

170Ak1325 k. Officers and employees of corporations. Most Cited Cases

Defendant corporation is responsible for producing its representatives for deposition regardless of whether corporate representative is designated by corporation or deposing party. Fed.Rules Civ.Proc.Rule 30(b)(1, 6), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

Depositions of corporate representatives are ordinarily taken at corporation's principal place of business, unless justice requires otherwise.

***356** Stephen D. Bonney, Jolley, Walsh & Hager, P.C., Kansas City, Mo., Christopher S. Richardson, John Counts, Counts & Kanne, Chtd., Washington, D.C., for plaintiffs.

Catherine A. Reinmiller, J.C. Hambrick, Jr., Schulz, Bender, Maher & Blair, Kansas City, Mo., for defendants.

***357 MEMORANDUM AND ORDER**

EARL E. O'CONNOR, Chief Judge.

This matter is before the court on plaintiffs' motion to review Magistrate Judge Rushfelt's May 6, 1991, Memorandum and Order. In his order of May 6, 1991, Magistrate Judge Rushfelt ruled that plaintiffs must depose Earl King, an officer and director of the defendant corporations, in Vancouver, British Columbia. In so holding, Magistrate Judge Rushfelt noted that King had not been designated as a corporate representative by the defendants. Plaintiffs in the instant motion request the court to reverse the ruling of the Magistrate Judge and order defendants to produce Mr. King for a deposition at the defendants' corporate offices and main place of business in Leawood, Kansas. Defendants have not responded to plaintiffs' motion.

[1] Under 28 U.S.C. § 636(b)(1)(A), a district judge's scope of review of a magistrate judge's determination is limited to whether the order is "clearly erroneous or contrary to law." *See also* D.Kan.Rule 604(a); Fed.R.Civ.P. 72(a). In their motion, plaintiffs contend that Magistrate Judge Rushfelt's order was contrary to law. Specifically, plaintiffs note that Mr. King, as an officer and director of the defendants, does not have to be designated by the defendants pursuant to Rule 30(b)(6) to be deemed a representative of the defendants. Rather, plaintiffs assert, King is automatically deemed a corporate representative because of his role as a director and officer. Accordingly, plaintiffs argue, Mr. King must be produced for deposition on behalf of the corporate defendants at their corporate offices and main place of business.

[2][3][4][5] Upon review, the court finds that the order of May 6, 1991, was contrary to law. As

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pointed out by the plaintiffs, a deposing party may obtain the deposition of a corporation through two alternative methods. First, as noted by Magistrate Judge Rushfelt, the deposing party may name the corporation as the deponent in its notice and then allow the corporation to designate one or more employees to testify on its behalf as representatives. Fed.R.Civ.P. 30(b)(6). Alternatively, however, a deposing party may, pursuant to Rule 30(b)(1), specifically name as the deponent a corporate employee. *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D.Mass.1987). If the named employee is a director, officer, or managing agent of the corporation, such employee will be regarded as a representative of the corporation. *Id.* Regardless of which method is used, the corporation is responsible for producing its representatives for deposition. 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2103, at 374–75 (2d ed. 1970). Further, such depositions are ordinarily taken at the corporation's principal place of business unless justice requires otherwise. *Id.* § 2112, at 410. Here, plaintiffs specifically wish to depose Mr. King, a director and officer of the defendants. In light of the above-cited authority, the court finds no reason for denying plaintiffs' request. Further, because defendants have filed no response to the instant motion, the court finds no justification for allowing the deposition to be taken other than at the defendants' principal place of business. Accordingly, plaintiffs' motion will be granted.

IT IS THEREFORE ORDERED that plaintiffs' motion to review Magistrate Judge Rushfelt's May 6, 1991, Memorandum and Order (Doc. # 46) is hereby granted.

D.Kan.,1991.

Moore v. Pyrotech Corp.

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**EXHIBIT CC OF
MINOR DECLARATION**

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H

United States District Court,
District of Columbia.
NATIONAL COMMUNITY REINVESTMENT
COALITION, Plaintiff,
v.
NOVASTAR FINANCIAL, INC., and Novastar
Mortgage, Inc., Defendants.

Civil Action No. 07-861 (RCL).
March 27, 2009.

Background: Affordable housing advocacy association filed suit, under Fair Housing Act, claiming that mortgagee discriminated against Native Americans, people with disabilities, and African Americans by refusing to grant mortgages secured by homes on Indian reservations, homes used for adult foster care, or city row houses. Association moved to amend complaint, to compel appearance of mortgagee's designee in Washington, D.C., and to compel discovery responses.

Holdings: The District Court, Royce C. Lamberth, Chief Judge, held that:

- (1) amendment to add mortgagee's president as defendant was warranted under exception to fiduciary shield doctrine, and
- (2) president was required to appear for deposition in Washington, D.C. as mortgagee's designee.

Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 🔑824

170A Federal Civil Procedure

170AVII Pleadings

170AVII(E) Amendments

170Ak824 k. Time for amendment in general. Most Cited Cases

Federal Civil Procedure 170A 🔑834

170A Federal Civil Procedure

170AVII Pleadings

170AVII(E) Amendments

170Ak834 k. Injustice or prejudice. Most Cited Cases

Federal Civil Procedure 170A 🔑851

170A Federal Civil Procedure

170AVII Pleadings

170AVII(E) Amendments

170Ak851 k. Form and sufficiency of amendment; futility. Most Cited Cases

District court has discretion to deny leave to amend for sufficient reason, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, or futility of amendment. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

[2] Constitutional Law 92 🔑3964

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-residents in general. Most Cited Cases

Federal Courts 170B 🔑76.1

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170B Federal Courts

170BII Venue

170BII(A) In General

170Bk76 Actions Against Non-Residents;

“Long-Arm” Jurisdiction in General

170Bk76.1 k. In general. Most Cited

Cases

Federal Courts 170B ⚙️ 417

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk417 k. Federal jurisdiction. Most

Cited Cases

District court may exercise jurisdiction over a nonresident defendant if jurisdiction is proper under both the long-arm statute and the requirements of constitutional due process. U.S.C.A. Const.Amend. 5.

[3] Federal Courts 170B ⚙️ 76.20

170B Federal Courts

170BII Venue

170BII(A) In General

170Bk76 Actions Against Non-Residents;

“Long-Arm” Jurisdiction in General

170Bk76.20 k. Persons acting in representative capacity, venue for; fiduciary shield. Most Cited Cases

The “fiduciary shield doctrine” counsels that personal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity.

[4] Constitutional Law 92 ⚙️ 3964

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-residents in general.

Most Cited Cases

Under the Due Process Clause, district court can exercise jurisdiction over a nonresident if he has purposefully established minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 5.

[5] Constitutional Law 92 ⚙️ 3965(10)

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3965 Particular Parties or Circum-

stances

92k3965(10) k. Representatives of organizations; officers, agents, and employees. Most Cited Cases

Federal Courts 170B ⚙️ 1037

170B Federal Courts

170BXI Courts of District of Columbia

170BXI(A) In General; District Court

170Bk1035 Jurisdiction of District Court

170Bk1037 k. Persons subject. Most Cited Cases

If exception to fiduciary shield doctrine applied, mortgagee's nonresident president had purposeful minimum contacts with forum, based on mortgagee's pattern of accepting applications from and making loans to forum residents that was attributable to president, sufficient for exercise of jurisdiction over

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president, under Due Process Clause and District of Columbia's long-arm statute, that would not offend traditional notions of fair play and substantial justice, in Fair Housing Act suit alleging that mortgagee discriminated against Native Americans, people with disabilities, and African Americans. U.S.C.A. Const.Amend. 5; Fair Housing Act, §§ 804, 805, 42 U.S.C.A. §§ 3604, 3605; D.C. Official Code, 2001 Ed. § 13-423(a).

[6] Federal Courts 170B  1037

170B Federal Courts

170BXI Courts of District of Columbia

170BXI(A) In General; District Court

170Bk1035 Jurisdiction of District Court

170Bk1037 k. Persons subject. Most

Cited Cases

District of Columbia's long-arm statute, granting personal jurisdiction over an individual as to a claim for relief arising from the person's transacting any business in the District of Columbia, is given an expansive interpretation that is coextensive with the Due Process Clause. U.S.C.A. Const.Amend. 5; D.C. Official Code, 2001 Ed. § 13-423(a).

[7] Constitutional Law 92  3965(10)

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3965 Particular Parties or Circumstances

92k3965(10) k. Representatives of organizations; officers, agents, and employees. Most Cited Cases

Federal Courts 170B  1037

170B Federal Courts

170BXI Courts of District of Columbia

170BXI(A) In General; District Court

170Bk1035 Jurisdiction of District Court

170Bk1037 k. Persons subject. Most

Cited Cases

Mortgagee's president was not protected under fiduciary shield doctrine, on grounds that he was more than employee of mortgagee, as required for exercise of personal jurisdiction, comporting with due process requirements and District of Columbia long-arm statute, over nonresident president based not only on his personal contacts with forum but also his contacts carried out solely in corporate capacity, and thus, amendment was warranted to add president as defendant in Fair Housing Act suit alleging that mortgagee discriminated against Native Americans, people with disabilities, and African Americans, where president exerted significant influence over mortgagee's policies, procedures, and operations. U.S.C.A. Const.Amend. 5; Fair Housing Act, §§ 804, 805, 42 U.S.C.A. §§ 3604, 3605; D.C. Official Code, 2001 Ed. § 13-423(a).

[8] Federal Civil Procedure 170A  851

170A Federal Civil Procedure

170AVII Pleadings

170AVII(E) Amendments

170Ak851 k. Form and sufficiency of amendment; futility. Most Cited Cases

A low likelihood of success on the merits is not an acceptable reason for denying leave to amend. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

[9] Federal Civil Procedure 170A  1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others

Pending Action

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170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

Generally, the deposition of a corporation by its agents and officers should be taken at its principal place of business; however, this rule is subject to modification when justice requires. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[10] Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

Four relevant factors district courts consider when determining whether modification is appropriate for general rule that deposition of a corporation by its agents and officers should be taken at its principal place of business: (1) location of counsel for both parties, (2) size of defendant corporation and regularity of executive travel, (3) resolution of discovery disputes by the forum court, and (4) nature of the claim, relationship of the parties, and expense of holding the examination. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[11] Federal Civil Procedure 170A 1333

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)1 In General

170Ak1333 k. Compensation of deponent. Most Cited Cases

Federal Civil Procedure 170A 1383

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(C) Depositions of Parties and Others
Pending Action

170AX(C)3 Examination in General

170Ak1383 k. Time and place of examination. Most Cited Cases

Rather than being deposed at mortgagee's principal place of business, mortgagee's president was required to appear in Washington, D.C. for deposition as mortgagee's designee, under discovery rule, requiring organization to designate individual to testify on its behalf about information known or reasonably available to organization, although plaintiff in Fair Housing Act suit against mortgagee was required to bear reasonable costs of president's travel and lodging, where plaintiff and counsel for both parties were located in Washington, D.C., and president frequently traveled nationwide for work-related reasons. Fair Housing Act, §§ 804, 805, 42 U.S.C.A. §§ 3604, 3605; Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

***28** Bradley Howard Blower, Glenn Schlactus, John Peter Relman, Megan Moran-Gates, Relman & Associates, PLLC, Washington, DC, for Plaintiff.

David M. Souders, Weiner Brodsky Sidman Kider PC, Washington, DC, for Defendants.

MEMORANDUM OPINION

ROYCE C. LAMBERTH, Chief Judge.

Before the Court are three substantive motions: plaintiff's Motion [26] for Leave to Amend the Complaint, plaintiff's Motion [38] to Compel Appearance of Rule 30(b)(6) Designee in Washington, D.C., and plaintiff's Motion [40] to Compel Discovery Responses. As detailed below, the Court will grant plaintiff's Motion [26], grant plaintiff's Motion [38], and deny without prejudice plaintiff's Motion [40].

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A. Factual Background

Plaintiff is suing defendants for alleged violations of the Fair Housing Act, 42 U.S.C. §§ 3604 and 3605. Specifically, plaintiff alleges that defendants discriminated against Native Americans, people with disabilities, and African Americans by explicitly refusing to grant mortgages secured*29 by “properties located on Indian reservations,” “properties for adult foster care,” or row houses in Baltimore, respectively. Plaintiff seeks declaratory, equitable, and monetary relief.

B. Plaintiff's Motion [26] for Leave to Add W. Lance Anderson as a Defendant

[1] Plaintiff seeks leave to amend its Complaint to add W. Lance Anderson, co-founder of NovaStar Financial and president of both NovaStar Financial and NovaStar Mortgage, as a defendant. An answer having been filed, this Court will “freely give leave when justice so requires.” Fed.R.Civ.P. 15(a)(2). However, it is within the Court's discretion to deny leave to amend for “sufficient reason, such as ‘undue delay, bad faith, [] dilatory motive ... repeated failure to cure deficiencies by [previous] amendments ... [or] futility of amendment.’ ” *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C.Cir.1996) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). The Court shall grant leave to amend here.

Plaintiff seeks to add Anderson because, based on defendants' interrogatory responses and other information, plaintiff contends that Anderson is the sole person responsible for the allegedly discriminatory lending policies challenged in the Complaint. (Pl.'s Mot. [26] at 1.) Defendants argue that (a) because of the fiduciary shield doctrine the Court cannot exercise jurisdiction over nonresident Anderson, and (b) even if it could the claims against Anderson are without merit and do not warrant amending the Complaint.

[2][3] Anderson works in Kansas City, Missouri and lives in a nearby Kansas suburb. This Court may exercise jurisdiction over a nonresident defendant if jurisdiction is proper under both the D.C. longarm statute and the requirements of constitutional due process. *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C.Cir.2000). Defendants argue that this Court's exercise of jurisdiction over Anderson would fail because of the fiduciary shield doctrine. The fiduciary shield doctrine counsels that “[p]ersonal jurisdiction over the employees or officers of a corporation in their individual capacities must be based on their personal contacts with the forum and not their acts and contacts carried out solely in a corporate capacity.” *Bailey v. J & B Trucking Servs., Inc.*, 577 F.Supp.2d 116, 118–19 (D.D.C.2008) (quoting *Wiggins v. Equifax, Inc.*, 853 F.Supp. 500, 503 (D.D.C.1994) (Lamberth, J.)). Because Anderson's contacts with D.C. are all in his corporate capacity, defendants argue, the fiduciary shield doctrine makes jurisdiction over him improper. Plaintiff counters that an exception to the fiduciary shield applies to Anderson and thus corporate contacts with the forum can be considered.

1. If an Exception to the Fiduciary Shield Applies, Personal Jurisdiction Over Anderson Is Appropriate

[4][5] Absent the fiduciary shield doctrine issue—that is, if an exception to the doctrine applies—this Court can exercise personal jurisdiction over nonresident Anderson. Under the Fifth Amendment's Due Process Clause, this Court can exercise jurisdiction over Anderson if he has purposefully established “minimum contacts with [the District of Columbia] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The Court can—*30 absent the fiduciary shield—attribute NovaStar Financial and NovaStar Mortgage's connections with Washington,

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D.C. to Anderson. Defendant companies clearly have such contacts: between 1999 and 2007 NovaStar Mortgage received 3,021 loan applications from D.C. residents, and 1,230 of those applications were approved with loans made. (Pl.'s Reply Ex. D [30–5] (Decl. of Caitlin Parton) (reviewing Home Mortgage Disclosure Act records).) Such a pattern of accepting applications from and making loans to District residents, when attributed to Anderson, constitutes purposeful establishment of minimum contacts with the District such that this Court's exercise of jurisdiction would not offend traditional notions of fair play and substantial justice.

[6] As for the D.C. longarm statute, D.C.Code § 13–423(a), plaintiff argues that jurisdiction could be achieved under subsection (a)(1). Subsection (a)(1) grants personal jurisdiction over an individual “as to a claim for relief arising from the person's ... transacting any business in the District of Columbia.” This Circuit has held that subsection (a)(1) “is given an expansive interpretation that is coextensive with the due process clause.” *Helmer v. Doletskaya*, 393 F.3d 201, 205 (D.C.Cir.2004) (quoting *Mouzavires v. Baxter*, 434 A.2d 988, 992 (D.C.1981)). Therefore, because this Court has already held that the due process clause has been satisfied through NovaStar Mortgage's transactions with District residents, subsection (a)(1) of the longarm statute is satisfied as well.

2. The “More Than An Employee” Exception to the Fiduciary Shield Applies to Anderson

Plaintiff argues that the fiduciary shield doctrine is inapplicable when the defendant is “more than an employee” of the corporation. This exception has indeed been recognized in this jurisdiction. For example, the D.C. Superior Court did not apply the fiduciary shield doctrine to two defendants who were the “only corporate officers” of the corporation, “set company policies and procedures,” were “active in day-to-day operations of the company,” and were “involve[d with] and supervis[ed] all aspects of the company.” *Covington & Burling v. Int'l Marketing &*

Research, Inc., Civ. No. 01–4360, 2003 WL 21384825 at *6 (D.C.Super.2003) (Blackburne–Rigsby, J.). Another judge of this Court has twice recognized *Covington*, but in both those cases he determined that the exception did not apply to the relevant facts. In *Kopff v. Battaglia*, a “chief programmer” of a blast-fax advertising firm was found to be not as integrally involved with the company as the defendants in *Covington*. He was not an officer, and he did not have “any role in directing or controlling company policy.” *Kopff v. Battaglia*, 425 F.Supp.2d 76, 85 (D.D.C.2006) (Bates, J.). In *D'Onofrio v. SFX Sports Group, Inc.*, the Court determined that a CFO and a head of human resources, though directly involved with the plaintiff's firing, did not play enough of a role in the corporate structure for jurisdiction to lie under the “more than an employee” exception. *D'Onofrio v. SFX Sports Group, Inc.*, 534 F.Supp.2d 86, 92–93 & n. 6 (D.D.C.2008) (Bates, J.).

[7] Anderson lies somewhere between the sole officers in *Covington* and the employees in *Kopff* and *D'Onofrio*. Based on the information before the Court, though, he seems closer to the officers in *Covington*—that is, he appears to be “more than an employee.” Again, he is the founder of defendant NovaStar Financial and the president of both defendant companies. Defendants' interrogatory response listed Anderson, and only Anderson, when asked to “identify ... all individuals responsible *31 for NovaStar's [challenged] policies.” (Defs.' Opp'n Ex. B [27–4] at 9.) Although he is not the sole officer of the defendant entities, as was the case in *Covington*, Anderson, as president, does appear to exert significant influence over defendants' policies, procedures, and operations. Anderson thus is “more than an employee” of the NovaStar entities and is not protected by the fiduciary shield doctrine.

3. Jurisdiction is Proper Based Upon NovaStar Mortgage's Contact With Forum

Because the “more than an employee” exception

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to the fiduciary shield doctrine applies to Anderson, NovaStar Mortgage's contacts and transactions within the forum can be considered for purposes of personal jurisdiction. As described above, those contacts are sufficient to satisfy both subsection (a)(1) of the long-arm statute and the requirements of constitutional due process.

4. Because Defendants' Criticism of the Merits of Claims Against Anderson Do Not Militate Against Leave to Amend, Plaintiff's Motion Shall Be Granted.

[8] Defendants' only remaining argument against plaintiff's motion is their contention that plaintiff's claims against Anderson are "without merit." (Defs.' Opp'n [27] at 1.) Defendants' main argument in this regard appears to be that Anderson's actions were all taken in his corporate capacity. This is no more than a rehash of defendants' fiduciary-shield arguments and does not establish an independent basis for denying plaintiff's motion for leave to amend. Defendants also argue that the claims against Anderson of discrimination in violation of the Fair Housing Act are "malicious" and "malevolen[t]." (*Id.* at 14, 19.) Even if defendants' characterizations are true, they do not form a basis for denying plaintiff's motion. Finally, defendants argue that it is frivolous, based on an assessment of the claim on the merits. But even if defendants are right, a low likelihood of success is not an acceptable reason for denying leave to amend.

Because the Court has concluded that it can exercise personal jurisdiction over Anderson, and in light of the fact that leave shall be freely granted, the Court shall grant plaintiff's Motion [26].

C. Plaintiff's Motion [38] to Compel Appearance of Rule 30(b)(6) Designee in Washington, D.C.

Plaintiff moves to compel Anderson to appear in Washington, D.C. to be deposed as defendant NovaStar Financial's 30(b)(6) designee. The Court shall grant plaintiff's motion, but plaintiff shall bear the reasonable costs of Anderson's travel and lodging.

[9][10] NovaStar Financial's principal place of business is in Kansas City, Missouri, and Anderson himself lives in nearby Mission Hills, Kansas. "The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business. This is subject to modification, however, when justice requires." 8A Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2112 (1994 & Supp. 2008). *Turner v. Prudential Insurance Co.*, 119 F.R.D. 381, 383 (M.D.N.C.1988), outlines four relevant factors courts can consider when determining whether modification is appropriate: location of counsel for both parties; size of defendant corporation and regularity of executive travel; resolution of discovery disputes by the forum court; and the nature of the claim and the relationship of the parties. Expense is also "an important question in determining where to hold the *32 examination." Wright, Miller & Marcus § 2112.

[11] Here, counsel for both parties are located in Washington, D.C. Plaintiff also argues that were the deposition held in Kansas City, sending a plaintiff's representative to assist plaintiff's counsel would result in additional expense. Defendant counterargues that plaintiff's representative is not *required* to attend the deposition, but given plaintiff's experience and expertise in fair lending practices the Court concludes that plaintiff's representative's travel expenses are relevant.^{FN1} As for the second *Turner* factor, it is uncontested that defendant NovaStar Financial does business nationwide (*see* Pl.'s Mot. [38] at 4 (stating that NovaStar Financial manages loans in forty-eight states)) and Anderson admits that he travels regularly for work. (Defs.' Opp'n Ex. 2 [43–4] ¶ 11.) However, defendant argues that Anderson's frequent travel makes his office time scarce and therefore suggests the deposition be held in Kansas City. This argument is logical, but it is not as persuasive as the view taken in *Turner* (frequent travel suggests that a modification would be less burdensome). As for discovery disputes, the Court is not moved by this factor. Most

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discovery disputes could be resolved by telephone regardless of the deposition location (in the unlikely event the Court needed to get involved at all); the convenience of being within the forum is an insufficient reason to modify the ordinary rule. Finally, as for the relationship between the parties, this factor is also somewhat of a wash: defendant NovaStar Financial is a corporation that does business nationally, but plaintiff is an advocacy organization with nationwide membership. After considering all of the factors, the number of deposition participants in Washington, D.C. (plaintiff and counsel for both parties) and Anderson's frequent work-related travel suggest that conducting the deposition in Washington, D.C. is appropriate.

FN1. The case that defendant cites for the contrary proposition, *Fuller v. Summit Treestands, LLC*, 2008 WL 3049852 (W.D.N.Y.2008), differs from this case because there defendant showed that plaintiff had failed to attend other depositions within the forum, thereby mitigating the relevance of plaintiff's potential travel costs.

The issue of expenses remains. Although the Court has determined that Anderson shall be deposed in Washington, D.C., the fact remains that *plaintiff* chose Washington as the forum for this action, presumably knowing full well that NovaStar Financial's principal place of business was in Kansas City. In light of the fact that the Court is departing from the general rule—at plaintiff's request—while also significantly reducing the overall costs of the deposition, it seems appropriate that plaintiff should bear the reasonable costs of Anderson's travel and lodging. *See, e.g., Moore v. George A. Hormel & Co.*, 4 F.R.D. 15, 16 (S.D.N.Y.1942) (ordering plaintiff to pay expenses when an in-forum deposition of corporate defendant was ordered, at plaintiff's request, based in part upon location of counsel). It shall be so ordered. Should plaintiff ultimately prevail in this action, these expenses may be recoverable as costs of

the action. *See* Fed.R.Civ.P. 54(d); Local Civ. R. 54.1.

D. Plaintiff's Motion [40] to Compel Discovery Responses

Plaintiff's Motion [40] seeks to compel defendant NovaStar Financial to respond to certain discovery responses made of it. At the time plaintiff filed this motion on November 18, 2008, the action was automatically stayed as to defendant NovaStar Mortgage due to its Suggestion of Bankruptcy [32] filed October 8, 2008. The *33 involuntary bankruptcy petition underlying the Suggestion was dismissed on March 9, 2009 (*see* Document [50]), and the automatic stay was thereby lifted. It appears from plaintiff's motion and the responsive filings thereto that the motion was largely necessitated by the automatic stay. Plaintiff's discovery requests do not seek any documents from NovaStar Financial that they do not also seek from NovaStar Mortgage.^{FN2} Defendant NovaStar Financial repeatedly contends that (1) the discovery plaintiff seeks to compel would act to circumvent the automatic stay and (2) some of the information sought cannot be provided by NovaStar Financial because it is in the possession of NovaStar Mortgage. Now that the automatic stay has been lifted, the Court is optimistic that the parties can resolve the remaining discovery issues without the Court having to intervene in the process. Accordingly, plaintiff's motion to compel shall be denied, but without prejudice to its refiling should plaintiff eventually conclude that defendants are still improperly withholding discovery.

FN2. All of the document requests and all but one of the interrogatories aimed at NovaStar Financial refer to NovaStar Financial and NovaStar Mortgage collectively as "NovaStar"; the remaining interrogatory (# 9) refers to both NovaStar Financial and NovaStar Mortgage. Indeed, defendants contend (and plaintiff does not contest) that the discovery sought of the two defendants is identical.

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CONCLUSION

For the reasons outlined above, the Court shall grant plaintiff's Motion [26], grant plaintiff's Motion [38] (with costs borne by plaintiff), and deny without prejudice plaintiff's Motion [40]. A separate Order shall issue this date.

D.D.C.,2009.
National Community Reinvestment Coalition v. NovaStar Financial, Inc.
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